SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 264.

CHARLES S. MAXWELL, PLAINTIFF IN ERROR,

vs.

GEORGE S. DOW, AS WARDEN OF THE UTAH STATE PRISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED AUGUST 24, 1892.

(17,495.)

(17,498.)

SUPREME COURT OF THE UNITED STATES.

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CHARLES L. MAXWELL, PLAINTIFF IN ERROR,

vs.

GEORGE N. DOW, AS WARDEN OF THE UTAH STATE PRISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1899.

1 In the Supreme Court of the State of Utah.

C. L. MAXWELL, Plaintiff,
v.
GEORGE N. DOW, as Warden of the Utah State Prison, Defendant.

Petition for Writ of *Habeas Corpus.*

To the honorable supreme court of the State of Utah:

The petition of C. L. Maxwell respectfully shows:

That he, the said C. L. Maxwell, is unlawfully imprisoned, detained, confined, and restrained of his liberty by George N. Dow, the warden of the Utah State prison, at the county of Salt Lake, in the State of Utah.

That the said imprisonment, detention, confinement, and restraints are illegal, and that the illegality thereof consists in this, to wit:

1. Your petitioner, C. L. Maxwell, is a natural-born citizen of the United States of America and subject to the jurisdiction thereof.

2. On the 27th day of June, 1898, at Provo City, Utah county, State of Utah, and in the fourth judicial district court of said State of Utah in and for said Utah county, the county and prosecuting attorney of Utah county made and caused to be filed in said court an instrument in writing commonly called an information,
2 wherein and whereby he assumed to charge your petitioner, under the name of John Carter, with the crime of robbery, a copy of which said information is hereto attached, marked Exhibit "A," and made a part of this petition.

3. That thereafter, to wit, on the 7th day of July, 1898, your petitioner was arraigned in said court, said alleged information was read to him, and he was required to say whether or not he was guilty of the crime charged in said instrument of writing then and there by the said court denominated an information; upon which demand he, your petitioner, said he was not guilty.

4. Thereafter, to wit, on the 19th day of September, 1898, in said court your petitioner was placed on trial upon said charge of robbery, as alleged in said information, before the court and a pretended jury, the same being a body of eight men only, who, after hearing the testimony offered at the said pretended trial, said, by a pretended verdict, a copy of which is hereto attached, marked Exhibit "B," and made a part of this petition, that your petitioner was guilty as charged in said information.

5. Upon said pretended verdict, rendered by only eight persons, the said court, on the said 19th day of September, 1898, pronounced its judgment against your petitioner that he be imprisoned in the State prison of the State of Utah, at the county of Salt Lake, for the term of eighteen years from said date.

6. That in accordance with and in execution of said judgment your petitioner was on said date delivered into the custody of the said defendant, George N. Dow, as warden of said State prison, and that said defendant has ever since said time imprisoned and still continues to imprison your petitioner in said State prison.

3 A copy of the said judgment and commitment is hereto attached, marked Exhibit "C," and made a part of this petition.

7. Your petitioner has never been in any other manner proceeded against nor tried for said charge than that above set forth, and there is no other cause for the imprisonment of your petitioner than those above set forth.

Your petitioner says that his imprisonment, based upon the foregoing statement of facts, is unlawful for the following reasons:

1. Holding him to answer for the crime of robbery, except on a presentment or indictment of a grand jury, abridges his privileges and immunities as a citizen of the United States as guaranteed by article V of the amendments to the Constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, etc.," and section one of article XIV of the amendments to the Constitution of the United States, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

2. Trying him by a pretended jury of only eight persons abridges his privileges and immunities as a citizen of the United States as guaranteed by article VI of the amendments to the Constitution of the United States, which provides as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed," etc., and section one of article

4 XIV of the amendments to the Constitution of the United States, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

3. The trial of your petitioner by a pretended jury of only eight persons and upon a verdict of guilty by said persons, imprisoning him in the State prison, is depriving him of his liberty without due process of law, and is in violation of his rights as guaranteed by section one of article XIV of the amendments to the Constitution of the United States, which provides: "No State shall deprive any person of life, liberty, or property without due process of law."

4. That section ten of article one and section thirteen — one of the constitution of the State of Utah, compelling your petitioner to be tried for a felony, except by a jury composed of twelve persons, and holding him to answer for a charge of felony, to wit, robbery, except on a presentment or indictment of a grand jury, abridge his privileges and immunities as a citizen of the United States, and said section ten, compelling him to be tried only by eight persons instead of a jury, deprives him of his liberty without due process of law, and said sections are in contravention of section one of article XIV of

the amendments to the Constitution of the United States, which provides: "That all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law," and
5 are therefore void.

VIII. That the legality of the imprisonment of your petitioner has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of your petitioner.

IX. No application for the writ of *habeas corpus* has heretofore been made to and refused by any court or judge.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said George N. Dow, warden as aforesaid, commanding him to have the body of C. L. Maxwell, your petitioner, before your honors at a time and place therein to be specified, to do and receive what shall then and there be considered by your honors concerning said C. L. Maxwell, together with the time and cause of his detention and said writ, and that he, said C. L. Maxwell, may be restored to his liberty.

C. L. MAXWELL,
By J. W. N. WHITECOTTON,
His Attorney.

STATE OF UTAH, } ss.:
Utah County, }

J. W. N. Whitecotton, being first duly sworn, says:

I am the attorney for C. L. Maxwell and on his behalf make the foregoing application for a writ of *habeas corpus*. I have read the foregoing petition and know the contents thereof, and believe the same to be true.

J. W. N. WHITECOTTON.

Subscribed and sworn to before me this 2nd day of May, 1899.

JOSEPH S. FARRAR,
Notary Public.

[SEAL.]

6 In the District Court of the Fourth Judicial District of the State of Utah in and for the County of Utah, the 18th Day of June, A. D. 1898.

THE STATE OF UTAH, Plaintiff,
v.
JOHN CARTER, Defendant. } Information. Exhibit "A."

John Carter, having heretofore, on the 28th day of May, A. D. 1898, been duly bound over by John S. Boyer, a committing magistrate in and for Utah county, State of Utah, to answer to this charge, is accused by Samuel A. King, the county attorney of Utah

county, State of Utah, by this information of the crime of robbery, committed as follows: The said John Carter, on the 28th day of May, A. D. 1898, at the county of Utah, in the State of Utah, did unlawfully, violently, forcibly, and feloniously make an assault in and upon one A. C. Packard, then and there being, and then and there did unlawfully, wilfully, forcibly, and feloniously him, the said A. C. Packard, put in fear, and two thousand three hundred and seventy dollars in gold coin, lawful money of the United States, of the value of two thousand three hundred and seventy dollars, the personal property of the Springfield Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, then and there being in the possession of
7 said A. C. Packard, and from the immediate presence of him, the said A. C. Packard, unlawfully, wilfully, forcibly, violently, and feloniously did take, steal, and carry away, against the will of the said A. C. Packard, and accomplished by means of force and fear, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Utah.

SAMUEL A. KING,
County Attorney of Utah County, State of Utah.

Names of witnesses examined before the committing magistrate:

No witnesses were examined before the committing magistrate, for the reason that the defendant waived his preliminary examination, to which waiver the State then and there consented.

Endorsed: 97. State of Utah *v.* John Carter. Information. Filed at Provo City, Utah, Jun- 27, 1898. Geo. Havercamp, clerk.

8 In the District Court of the Fourth Judicial District, County of Utah, State of Utah.

THE STATE OF UTAH, Plaintiff,
v.
C. L. MAXWELL, alias JOHN CARTER, Defendant. } Verdict. Exhibit "B."

We, the jury, empanneled in the above-entitled cause, find the defendant, C. L. Maxwell, guilty as charged in the information.

ALFRED DUNCKLEY, *Foreman.*

Dated at Provo, Utah, September 19, 1898.

Endorsed: 97. Verdict. Filed this 19th day of September, 1898. Geo. Havercamp, clerk.

9 At a stated term of the district court for the fourth judicial district, State of Utah, held at the court-room of said court, at Provo, county of Utah and State of Utah, on the 19th day of September, A. D. 1898.

Present: The Hon. Warren N. Dusenberry, judge.

THE STATE OF UTAH
against
C. L. MAXWELL, alias JOHN CARTER. } Commitment to State Prison. Exhibit "C."

Defendant being present in court and ready for sentence, thereupon the court renders its judgment:

That whereas said defendant, C. L. Maxwell, having been duly convicted in this court of the crime of robbery, it is therefore ordered, adjudged, and decreed that the said C. L. Maxwell be imprisoned in the State prison of the State of Utah, at the county of Salt Lake, for the term of eighteen years hereof.

You, said defendant, C. L. Maxwell, are rendered into the custody of the sheriff of Utah county, State of Utah, to be by him delivered into the custody of the warden or other proper officer of said State prison.

WARREN N. DUSENBERRY, *Judge.*

Endorsed: No. 97. The State of Utah *v.* C. L. Maxwell. Warrant of commitment. Filed on return the 20th day of September, 1898. Geo. Havercamp, clerk.

Endorsed on cover: In the supreme court of the State of Utah. C. L. Maxwell, plaintiff, *v.* George N. Dow, def't. Application for writ of *habeas corpus.* Original. Filed May 3, 1899. Lilburn P. Palmer, clerk supreme court Utah.

10 In the Supreme Court of the State of Utah, Regular May Term, May 24th, 1899.

C. L. MAXWELL, Plaintiff,
v.
GEORGE N. DOW, as Warden of the Utah State Prison, Defendant. } Submission.

This cause, coming on regularly to be heard, was argued by Mr. J. W. N. Whitecotton in behalf of the plaintiff, by Mr. W. A. Lee, deputy attorney general, in reply, was submitted, and by the court taken under advisement.

Title of Court and Cause.

JUNE 1, 1899.

This cause having been heretofore argued and submitted and the court being now sufficiently advised thereon, it is now here considered, ordered, and adjudged that the writ of *habeas corpus* as prayed for be, and the same is hereby, denied.

11 In the Supreme Court of the State of Utah.

In the Matter of the Application of C. L. MAXWELL for a Writ of *Habeas Corpus.*

MINER, *J.:*

The plaintiff in his petition alleges that he is a citizen of the United States; that on the 27th day of June, 1898, in the 4th judi-

cial district court, in Utah county, Utah, the county attorney of said county made and filed in said county an information in writing, charging the petitioner under the name of John Carter with the crime of robbery; that thereafter the petitioner was duly arraigned on such information and a plea of not guilty entered.

That thereafter, on the 19th day of September, 1898, said petitioner was placed on trial on the charge contained in said information before the court and eight jurors and found guilty of said charge, and duly sentenced to the State prison at Salt Lake City, Utah, for the period of 18 years; that the petitioner is now confined in the State prison and imprisoned there by Geo. N. Dow, the warden of said prison, and is serving such sentence.

The petitioner claims that such conviction and imprisonment is illegal for the reason:

1st. That holding him to answer for a charge of felony otherwise than upon a presentment or indictment of a grand jury
12 abridges his privileges and immunities as a citizen of the United States, contrary to section 1 of art. 14 of the amendments to the Constitution of the United States.

2nd. That in trying him before a jury of only eight persons instead of twelve, and upon a verdict of guilty by such a jury, pronouncing judgment against him, requiring that he be imprisoned in the State prison for a period of eighteen years, abridges his privileges as a citizen of the United States, contrary to the provisions of articles 6 of the amendments to the Constitution of the United States.

3rd. That by reason of the verdict of guilty by a jury of eight persons and the judgment of imprisonment thereon he has been deprived of his liberty without due process of law, within the meaning of section 1 of article 14 of the amendments to the Constitution of the United States.

In the case of *Ex parte* McKee, decided at the January term of this court, 57 Pac. Rep., —; 18 Utah, —, the same questions were raised as are embraced in the second and third grounds contained in the complaint in this case. In that case, after a careful examination of the Constitution and statutory provisions of the law and many decisions bearing thereon, we held, in substance, that the prohibitory provision of the 5th and 6th amendment to the Constitution of the United States applies exclusively to the United States and not to the respective States.

2nd. That the fourteenth amendment to the Constitution of the United States does not limit the power of State governments in the prosecution of criminals to any particular mode of procedure in the selection of its jurors or manner of conducting its trials, but does require that such trials shall be conducted in due course of law according to the prescribed forms and judicial procedure of
13 the State for the protection of the individual rights and liberties of its citizens.

3rd. That sec. 10, art. 1, of the constitution of Utah is not in conflict with the Federal Constitution or the amendments thereto, and a conviction under sec. 1295, Rev. Stat., is legal and in due process

of law, and not in violation of the fourteenth amendment to the Constitution of the United States.

4th. That under sec. 10, art. 1, const. Utah, and sec. 1295, Rev. Stat. 1898, a jury for the trial of one accused of grand larceny committed since the State was admitted into the Union may lawfully consist of eight jurors.

Upon an examination of this case we discover no good reason for modifying our opinion in the above case. The decision therein is correct, and is also decisive of the questions embraced in the petitioner's contention above referred to.

It is also contended that the petitioner was held to answer a charge of felony otherwise than upon a presentment or indictment of a grand jury, and that he was held, convicted, and imprisoned upon an information filed by the county attorney charging him with a felony; that such acts were illegal and abridge his privileges and immunities as a citizen of the United States under sec. 1, art. 14, of the amendments to the Constitution of the United States, which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is contended that the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" applies and extends to citizens of each State and to State courts.

14 Sec. 18, art. 1, of the constitution of Utah provides: "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it."

Sec. 21, art. 8, const. Utah, reads as follows: "Judges of the supreme court, district courts, and justices of the peace, shall be conservators of the peace, and may hold preliminary examinations in cases of felony."

In Walker *v.* Sauvinet, 92 U. S., 90, it was said, upon a discussion of this same question, in an action which was brought by a colored man against the keeper of a coffee-house in New Orleans for refusing him refreshments, in violation of the constitution of the State securing to the colored race equal rights and privileges in such cases, that a trial by jury was not a privilege or immunity of citizenship which the States were forbidden to abridge, but the requirement of due process of law was met if the trial was had according to the settled course of judicial proceedings. "Due process of law," said Chief Justice Waite, "is process due according to the law of the land. This process in the States is regulated by the law of the

State." This law was held not to be in conflict with the Constitution of the United States.

In Hurtado *v.* California, 110 U. S., 516, it was held that due process of law did not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The constitu-
15 tion of California authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without an indictment by a grand jury, in the discretion of the legislature. It was held that conviction upon such an information, followed by sentence, was not illegal under the fourteenth amendment.

In Hallinger *v.* Davis, 146 U. S., 314, it was held in substance that a statute of a State conferring upon an accused person the right to waive a trial by jury and to elect to be tried by a court and conferring power upon the court to try the accused in such case was not a violation of the due process of law clause of the fourteenth amendment.

So, in *In re* Kemmler, 136 U. S., 436, it was held that the law providing for capital punishment by electricity was not repugnant to this amendment.

In Duncan *v.* Missouri, 152 U. S., 377, it was said that the prescribing of different modes of procedure and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds persons accused of crime, are not considered within the constitutional inhibition.

The case of Hurtado *v.* California was again referred to and affirmed in the case of Holden *v.* Vermont, 168 U. S., 262. After holding that it was not necessary that an indictment by a grand jury be found in a prosecution by a State for murder, the court said: "It is further claimed that the conviction of the plaintiff and his sentence to infamous punishment was without due process of law because he was not indicted by a grand jury. Discussion of this contention is unnecessary because it was the very matter considered in Hurtado *v.* California, 110 U. S., 516, where it was ruled that the words 'due process of law' in the fourteenth amend-
16 ment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The views expressed in that case have been approved and followed in a number of subsequent cases."

Barbier *v.* Connolly, 113 U. S., 27.
In re Kemmler, 136 U. S., 436.
Ex parte Converse, 137 U. S., 624.
Hallinger *v.* Davis, 146 U. S., 314.

In *Ex parte* Converse, 137 U. S., 624, the court said:

"This amendment was not designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State."

In *Ex parte* McKee, *supra*, this court, among other things, said:

"The fourteenth amendment was not designed to confine the States to a particular mode of procedure in judicial proceedings. It does not mean nor has it the effect to limit the power of State governments in the prosecution of criminals to any particular mode of procedure in the selection of its jurors or manner of conducting its trials, but did require that such trials shall be conducted in the due course of the administration of justice according to the prescribed forms and judicial procedure of the State for the protection of the individual rights and liberties of its citizens. That which the common law tolerated might be regarded as due process of law, but methods and procedure which were unknown to the common law cannot be discarded if they are consistent with the cardinal principles and ground-work which are necessary to the administration of justice in the several States. As said in Hurtado *v.* California, *supra*, it follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly
17 devised in the discretion of the legislative power in furtherance of the general public good, which requires and preserves these principles of liberty and justice, must be held to be due process of law."

Holden *v.* Hardy, 169 U. S., 366.

The decisions from the Federal courts upon the question involved renders it unnecessary to pursue the investigation further. It is clear from the authorities referred to that the petitioner was deprived of no constitutional right by being held to answer to a charge of felony otherwise than upon presentment or indictment of a grand jury.

In passing upon the validity of the acts of this State under sec. 1 of article 14 of the amendments and in examining authorities controlling such action, it will be seen that law is progressive. The method and mode of procedure in many States have changed in order to keep pace with the constant changing future and necessities of the period. Many of the methods of procedure in force when the Constitution was adopted are found to be no longer necessary. Many restrictions placed upon the citizen at an early date were found to be injurious to the interests of the people as years rolled by, and many were found to be in need of greater and additional protection under the laws. In several States grand juries have been abolished, and prosecutions by information has been substituted in its place. The system of 12 jurors in criminal cases, not capital, and in civil cases has been discarded in many States and a less number provided, with the right in civil cases to a two-thirds majority verdict, and these changes have been sustained by decisions of courts of the highest authority. As was said in Hurtado *v* California, *supra*, "the Constitution was made for an undefined and expanding future and for a people gathered and to be gathered from many nations and many tongues."

18 While the cardinal principles of justice are unchangeable, the methods by which trials are conducted are undergoing

constant and in many instances necessary changes to satisfy the pressing needs of the people, and the Constitution should not be so construed as to deprive a State of the power to so modify or change it- laws as to make them conform to the wishes and necessities of its people and of the public welfare, but without bringing them in violation of the fundamental law.

As a trial under State laws under an information filed by State authority, in the absence of a presentment of a grand jury, in the case of Hurtado *v.* California was held to be by due process of law, it is difficult to see why the same proceedings and trial under the laws of this State should abridge the privileges or immunities of the petitioner or deprive him of his liberty without due process of law.

The trial and conviction of the petitioner under the constitution and laws of this State upon an information duly filed against him by the county attorney did not take from or abridge his privileges or immunities as a citizen of the United States, nor were the provisions of the fourteenth amendment violated by his trial and conviction in the manner as provided by the laws of the State of Utah.

The writ of *habeas corpus* prayed for in the petition is denied.

We concur:

BARTCH, *C. J.*

BASKIN, *J.*

19 Filed Jul- 20, 1899. Lilburn P. Palmer, clerk supreme court Utah.

In the Supreme Court of the United States.

CHARLES L. MAXWELL, Plaintiff in Error,
vs.
GEORGE N. DOW, as Warden of the Utah State Prison, Defendant in Error.
} Petition for Writ of Error.

Comes now Charles L. Maxwell, the plaintiff herein, and respectfully shows to the court:

1. That he is a natural-born citizen of the United States.

2. That on the 27th day of June, 1898, at Provo City, Utah county, State of Utah, and in the fourth judicial district court in and for said county, the prosecuting attorney of said county made and caused to be filed in said court an information, whereby he charged this plaintiff with the crime of robbery, calling plaintiff by the name of John Carter.

3. That thereafter, to wit, on the 7th day of July, 1899, plaintiff was arraigned in said court upon said information, and entered a plea of "not guilty."

4. Thereafter, to wit, on the 19th day of September, 1898, in said court, plaintiff was tried in said court upon said charge of robbery, as charged in said information, before the court and a pretended jury of only eight persons, who, after hearing the testimony offered, said by a pretended verdict that plaintiff was guilty as charged in said information, and upon said verdict the said court

pronounced its judgment against plaintiff, that he be imprisoned in the State prison of the State of Utah for eighteen years.

5. That ever since said date plaintiff has been and still is imprisoned in said prison.

20 6. That on or about the — day of May, 1899, plaintiff filed in the supreme court of the State of Utah his petition for a writ of *habeas corpus* against George N. Dow, as warden of said prison, in which petition he set forth all the foregoing facts and prayed said court that he might be discharged from said imprisonment on the following grounds, to wit:

1. That holding him to answer for the crime of robbery, except upon a presentment or indictment of a grand jury, abridges his privileges and immunities as a citizen of the United States as guaranteed by article V of the amendments to the Constitution of the United States, which provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," etc., and section one of article XIV of the amendments to the Constitution of the United States, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

2. Trying him by a pretended jury of only eight persons abridges his privileges and immunities as a citizen of the United States as guaranteed by article VI of the amendments to the Constitution of the United States, which provides as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," etc., and section one of article XIV of the amendments to the Constitution of the United States, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the priv-

21 ileges or immunities of citizens of the United States."

3. The trial of your petitioner by a pretended jury of only eight persons and upon a verdict of guilty by said persons imprisoning him in the State prison is depriving him of his liberty without due process of law and is in violation of his rights as guaranteed by section one of article XIV of the amendments to the Constitution of the United States, which provides: "No State shall deprive any person of life, liberty, or property, without due process of law."

4. That section ten of article one and section thirteen of article one of the constitution of the State of Utah, compelling your petitioner to be tried for a felony except by a jury composed of twelve persons and holding him to answer for a charge of felony, to wit, robbery, except on a presentment or indictment of a grand jury, abridges his privileges and immunities as a citizen of the United States, and said section ten, compelling him to be tried by only

eight persons instead of a jury, deprives him of his liberty without due process of law, and said sections are in contravention of section one of article XIV of the amendments to the Constitution of the United States, which provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law abridging the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law," and are therefore void.

7. That said cause came on regularly to be heard in said supreme court on the — day of May, A. D. 1899, and after hearing arguments the court took the cause under advisement, and subsequently, to wit, on the — day of May, 1899, rendered its judgment, whereby it ruled each and every of said contentions against the plain-
22 tiff, and expressly decided that none of the matters or things set out in said petition, which were not controverted as matters of fact, denied to plaintiff any right, privilege, or immunity guaranteed to him by the Constitution of the United States.

In the judgment of the supreme court of the State of Utah this plaintiff is by his counsel advised and verily believes, and therefore states, that error was committed to his great detriment and injury, which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore the plaintiff prays—

That a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 20th, 1899.

CHARLES L. MAXWELL,
By J. W. N. WHITECOTTON,
His Attorney.

Attorney's address: Provo, Utah.

23 Filed Jul- 20, 1899. Lilburn P. Palmer, clerk supreme court Utah.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said cause between Charles L. Maxwell and George N. Dow, as warden of the Utah State prison, wherein was drawn in question the validity of the constitution and laws of the State of Utah and an authority exercised under said State, on the ground of their being repugnant

to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Charles L. Maxwell, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the eighteenth day of September, A. D. 1899, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twentieth day of July, A. D. 1899.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah.

Allowed by—

G. W. BARTCH,
Chief Justice of the Supreme Court of the State of Utah.

24 UNITED STATES OF AMERICA, *ss:*

To George N. Dow, as warden of the Utah State prison, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, wherein Charles L. Maxwell is plaintiff in error and George N. Dow is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Bartch, chief justice of the supreme court of the State of Utah, this twentieth day of July, A. D. 1899.

G. W. BARTCH,
Chief Justice of the Supreme Court of the State of Utah.

Filed Jul- 20, 1899.

LILBURN P. PALMER,
Clerk Supreme Court Utah.

Due service of the above admitted this July 27th, 1899.

A. C. BISHOP,
Attorney General of State of Utah.

25 Filed Jul- 20, 1899. Lilburn P. Palmer, clerk supreme court Utah.

In the Supreme Court of the United States.

In the Matter of the Petition of CHARLES L. MAXWELL for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Errors.

Comes now Charles L. Maxwell, petitioner for a writ of error to the supreme court of the State of Utah, by J. W. N. Whitecotton, his attorney, and says that the said supreme court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following particulars, to wit:

1. The said court erred in upholding the validity of section ten of article one of the constitution and laws of the State of Utah, providing that a jury for the trial of felonies should be composed of eight persons only in cases not capital.

2. The said court erred in deciding that trying the plaintiff herein on a charge of robbery, which by the laws of the State of Utah is a felony, by only eight persons sitting in the place of a jury, and upon a verdict of guilty imprisoning him in the penitentiary for eighteen years, is not depriving him of his liberty without due process of law.

3. The said court erred in deciding that the said section ten of article one of the constitution of Utah and the laws of said State made in pursuance thereof do not abridge plaintiff's privileges and immunities as a citizen of the United States as guaranteed to him by the sixth and fourteenth amendments to the Constitution of the United States.

4. The said court erred in deciding that holding the plaintiff
26 to answer to a charge of robbery, unless upon a presentment or indictment of a grand jury, does not abridge his privileges and immunities as a citizen of the United States as guaranteed by the fifth and fourteenth amendments to the Constitution of the United States.

5. The said court erred in deciding that plaintiff was not entitled to be discharged from his imprisonment.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

27 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, }
In the State of Utah, County of Salt Lake, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, in pursuance of the writ of error heretofore allowed in the case wherein C. L. Maxwell is plaintiff in error and George N. Dow,

as warden of the Utah State prison, is defendant in error, do transmit, attached hereto, a transcript of the record and proceedings and opinion in said cause, together with the original petition for a writ of error, writ of error, citation, and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of the record and proceedings and opinion is a full, true, and correct copy of the several originals thereof now on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Utah this 21st day — July, A. D. 1899.

Seal Supreme Court, State of Utah, Jan. 4, 1896.

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

Endorsed on cover: File No., 17,498. Utah supreme court. Term No., 384. Charles L. Maxwell, plaintiff in error, *vs.* George N. Dow, as warden of the Utah State prison. Filed August 25, 1899.

In the Supreme Court of the State of Utah.

C. L. MAXWELL, Plaintiff,
v.
GEORGE N. DOW, as Warden of the State Prison, Defendant. } Return of Writ.

George N. Dow, warden of the Utah State prison, to whom the annexed and within writ is directed, has now here before the court the body of C. L. Maxwell, therein named, as thereby commanded, and certifies that the cause of the detention of the said C. L. Maxwell is a warrant of commitment, directed to him, George N. Dow, warden of the State prison of the State of Utah, a copy of which said commitment is set forth in the said C. L. Maxwell's petition, marked "Exhibit C," and made a part thereof, issued in the manner and under the circumstances and for the purposes set forth in the petition of the said C. L. Maxwell, the plaintiff herein.

And the said George N. Dow says that said detention of the said C. L. Maxwell is under the authority and by virtue of the said judgment and commitment, and that the same is not in any manner illegal or unlawful, and that the matters and things alleged in said petition are not sufficient in law and do not constitute any reason in law why said plaintiff should be discharged.

Said defendant herewith returns said writ into court, which is hereto annexed, marked "Exhibit A," and made a part hereof.

Wherefore defendant prays that he may be discharged and hence dismissed with his costs.

G. N. DOW,
Warden of the State Prison.

A. C. BISHOP,
Attorney General, for Defendant.

"EXHIBIT A."

In the Supreme Court of the State of Utah.

C. L. MAXWELL, Plaintiff,
v.
GEORGE N. DOW, as Warden of the State Prison, Defendant. }

The State of Utah to George N. Dow, warden of the Utah State prison, Greeting:

We command you that you have the body of C. L. Maxwell, by you imprisoned and detained, as is averred, together with the time and cause of such imprisonment and detention, by whatsoever name

said C. L. Maxwell be called or charged, before the supreme court of the State of Utah, at the court-room of said supreme court, at the city and county of Salt Lake, on Monday, the 8th day of May, 1899, at ten o'clock a. m. of that day, to do and receive what shall then and there be considered concerning the said C. L. Maxwell; and have you then and there this writ.

Witness the Honorable George W. Bartch, chief justice of the supreme court of the State of Utah, the third day of May, 1899

[SEAL.] G. W. BARTCH.

Endorsed on back: In the supreme court of the State of Utah. C. L. Maxwell, plaintiff, *v.* George N. Dow, as warden of the *the* State prison, defendant. Return of writ. Filed May 24, 1899. L. P. Palmer, clerk. Due service and copy this May 24, 1899. J. W. N. Whitecotton, attorney for petitioner.

UNITED STATES OF AMERICA, } ss:
State of Utah, County of Salt Lake, }

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the return of the writ in the foregoing-entitled action, now of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this the 19th day of October, A. D. 1899.

[Seal State of Utah Supreme Court, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court.

In the Supreme Court of the United States.

CHARLES L. MAXWELL, Plaintiff in Error, *vs.* GEORGE N. DOW, as Warden of the *United* States Prison, Defendant in Error.	No. 384, October Term, 1899. Stipulation.

It is hereby stipulated and agreed that the foregoing is a full and true copy of the original writ of *habeas corpus* and the defendant's return thereto as the same appears on file in the supreme court of the State of Utah in said cause, and it is further stipulated and agreed that the same may be filed in the Supreme Court of the United States in said cause and printed as a part of the record in said cause.

It is further stipulated that the foregoing are the only portions of

the original record not heretofore sent up by the clerk of the supreme court of the State of Utah.

Dated October 31st, 1899.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.
L. T. MICHENER,
ALEXANDER C. BISHOP, *Att'y Gen'l,*
Attorney- for Defendant in Error.

[Endorsed:] File No., 17,498. Supreme Court U. S., October term, 1899. Term No., 384. Chas. L. Maxwell, P. E., *vs.* George N. Dow, as warden of the Utah State prison. Stipulation and addition to record. Filed Nov. 6, 1899.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

NO. 384.

CHARLES L. MAXWELL,
Plaintiff in Error,

vs.

GEORGE M. DOW, as Warden of the Utah State Prison,
Defendant in Error.

In Error to the Supreme Court of Utah.

PLAINTIFF'S BRIEF.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

25 copies filed October ____ 1899.

_____ Clerk.

(17498)

WAVE PRINT, SIGNS, UTAH.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

NO. 384.

CHARLES L. MAXWELL,
Plaintiff in Error,

vs.

GEORGE N. DOW, as Warden of the Utah State Prison,
Defendant in Error.

In Error to the Supreme Court of Utah.

PLAINTIFF'S BRIEF.

In this case, the plaintiff filed in the Supreme Court of Utah his petition for a writ of *habeas corpus*, and as grounds for the same alleged the following facts:

1. That he is a citizen of the United States.

2. That in the month of June, 1898, at Provo City, Utah County, State of Utah, in the Fourth

Judicial District Court of said State, the prosecuting attorney of said county, made and caused to be filed an information whereby the plaintiff was charged, under the name of John Carter, with the crime of robbery, alleged to have been committed in Utah County, Utah, in the month of May, 1898.

3. That he was arraigned in said court on said information and entered a plea of "not guilty."

4. That in the month of September, 1898, he was tried in said court on said charge by a pretended jury of only eight persons, by them found guilty, and upon such pretended verdict, sentenced to be confined in the Utah State prison for eighteen years, and in pursuance and execution of said judgment, was and still is imprisoned in said State Prison, by George. N. Dow, as Warden thereof.

Plaintiff in error claimed in that proceeding that his imprisonment on the record as set out was illegal and void for the following reasons:

1. He claimed that holding him to answer for the crime of robbery, except on a presentment or indictment of a grand jury, abridged his privileges and immunities as a citizen of the United States as guaranteed by Article V. of the Amendments to the Constitution of the United States, which pro-

vides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, etc.," and section one of Article XIV of the Amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

2. He claimed that trying him by a pretended jury of only eight persons abridges his privileges and immunities as a citizen of the United States as guaranteed by Article VI. of the Amendments to the Constitution of the United States, which provides as follows:

"In all criminal prosecutions the Accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, etc."

And Section 1 of Article XIV of the amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

3. He claimed that trying him by a pretended jury of only eight persons and upon a verdict of guilty by said persons, imprisoning him in the State prison, is depriving him of his liberty without due process of law, and is in voilation of his rights as guaranteed by section one of Article XIV of the Amendments to the Constitution of the United States, which provides:

"No state shall deprive any person of life, liberty or property without due process of law."

4. He claimed, that section ten of Article one, and section thirteen of Article one of the Constitution of the State of Utah, compelling him to be tried for a felony, except by a jury composed of twelve persons, and holding him to answer for a charge of felony, to-wit: robbery, except on a presentment or indictment of a grand jury, abridge his privileges and immunities as a citizen of the United States, and said section ten, compelling him to be tried by only eight persons instead of a jury, deprives him of his liberty without due process of law, and said sections are in contravention of section one of Article XIV of the Amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law,"

and are therefore void.

All the facts set out in the petition were admitted by the defendant, and the Supreme Court of Utah, on the first day of June, 1899, rendered its judgment in the cause, overruling each and every one of the petitioner's contentions, and denied his prayer for release.

It is to review that judgment, that he has brought the case here on Writ of Error.

It would be useless perhaps for us to attempt to state to the court in plainer language than that used above, the exact contention made by the plaintiff in error. It is apparent, that he claims the right to be released from imprisonment, because, he says, he is imprisoned in violation of the rights, privileges, and immunities guaranteed to him by the Constitution of the United States.

In 1892, a wild and untamed spirit of innovation in respect to juries took possession of the legislature of the Territory of Utah, and the same

frenzy invaded the sacred precincts of the Territorial Supreme Court. They held that a verdict rendered by nine out of twelve persons sitting as a jury was valid. That opinion lasted and astonished every one learned in the law, until the Supreme Court of the United States had an opportunity of wiping it out.

When the Territory came to frame a constitution, upon which to be admitted into the Union as a State, it did not forget that its first step towards this heresy regarding juries had been rebuked, and took occasion to plant the new seed so deep that it thought it could not be washed or blown out of the soil. They therefore put into Article one of the State Constitution the following:

"Sec. 10. (Trial by jury.) In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Under this article of the Constitution, a number of persons were tried by only eight jurors for offenses alleged to have been committed before the Constitution was adopted. These men all ob-

jected to being so tried, and one of them appealed to the Supreme Court of the State, where he was told in a very elaborate opinion:

State vs. Bates, 14 *Utah*, 293.

That it was very clear that the Constitution and laws of Utah, providing for a trial in cases of felony by eight persons sitting as a jury, applied to cases arising before the Constitution went into effect. Consequently Mr. Bates was shut up in the penitentiary. Thomson's case was disposed of by a reference to the opinion of the Court in the Bates case.

State vs. Thompson, 15 *Utah* 488.

In the case of *The State vs. Hart*, 57 *Pac. Rep.* 415. The same court says the opposite view is just as clear as anything can be.

The fact that the learned Supreme Court of Utah has been in error in every decision that it has ever made relative to juries, unless it be the last named case, that has never been reviewed, encourages the plaintiff in error to be dissatisfied with the decision in his case. By a long line of decisions it became the settled and accepted view of the law, that the first eight Articles of Amendments to the Constitution of the United States applied only as limitations on the powers of Congress.

So that prior to the adoption of the Fourteenth Article of Amendments, there was no reason, so far as the Federal Constitution was concerned, why one accused of a felony, might not be tried even without a jury in a state court.

The plaintiff in this case contends, that by the Fourteenth Amendment, all the privileges and immunities guaranteed to citizens of the United States by the Fifth and Sixth Amendments, as against any action by the Federal Government, are protected from invasion by any state.

The first eight Articles of Amendments seem to have been intended to be and to have been accepted as being a Bill of Rights, intended as an everlasting bulwark for the people against any effort of the national government to encroach upon the fundamental liberties of the people. If these rights, privileges, and immunities, did not pertain to the people as citizens of the United States, it is difficult to see in what relation they did belong to them. By this Bill of Rights, Article V, no person could be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury. By the Sixth Article of this same Bill of Rights. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial *jury*

of the state and district wherein the crime shall have been committed. These privileges and immunities certainly are spoken of in relation to *Citizens* of the United States. Who else would be likely to be held to answer for criminal offenses? Who else than citizens would be likely to be tried in any court? Surely it will not be claimed that these amendments were made specially for the protection of foreigners, many of whom never heard of a jury trial, and would have no idea what it meant if they did. These then must have been privileges and immunities guaranteed to citizens of the United States.

Prior to the adoption of the Fourteenth Amendment, there was no Constitutional definition of citizenship.

The Bill of Rights comprised in the first eight amendments had been approved, and were thought good enough to be placed beyond the reach of the several states. That security was provided in the Fourteenth Amendment.

The attention of the Court is respectfully invited to the history of this Fourteenth Amendment, as it was presented before the United States Senate in Committee of the Whole, as reported by the joint Committee of the Senate and House.

An account of the transaction may be found in the Congressional Globe, 1st. Session of 39th Congress part 3. pp. 2765–6, where, in discussing it on behalf of the Committee, of which he was a member, after referring to the privileges and immunities spoken of in the second section of the Fourth Article of the Constitution, Senator Howard says:

"To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight Amendments to the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owners; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishment.

"Now, Sir, here is a mass of privileges, immunities and rights, some of them secured by the second section of the Fourth Article of the Consti-

tution, which I have recited, some by the first Eight Amendents of the Constitution, and it is a fact well worthy of attention that the course of decisions of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States, and as a party to their courts. They do not operate in the slightest degree, as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation, is not a restriction upon state legislation, but applies only to the legislation of Congress.

"Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course, do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply, as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this Amendment is, therefore, to restrain the power of the States, and compel them at all times to respect these great fundamental guarantees. * * * *

It will, if adopted by the states, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges, which pertain to citizens of the United States, and to all persons, who may happen to be within their jurisdiction."

Of course it is not contended that the language of an advocate of a measure in the legislative body enacting the law is to be taken as absolutely conclusive upon the question of the intent of the legislature, still, the reasons assigned by Senator Howard in the foregoing language clearly show the evils sought to be remedied, and that this very Amendment to the Constitution was designed by its framers to remedy the defect in the Bill of Rights, as it appeared in the first eight Amendments to the Constitution of the United. He sets out clearly and forcibly, that the guaranties and protections contained in those Amendments have been considered by the Courts to be limitations upon the Federal Government alone, and as affording no protection against the action of state legislatures, and asks that the Fourteenth Amendment be adopted so as to prevent the States from encroaching upon those fundamental rights.

If anything were needed to demonstrate the necessity of such a safe-guard, we submit that the

actions of the Utah Constitutional Convention and the Supreme Court of Utah have supplied the "long felt want."

Without being able to find any decision by this Court directly upon this question, we have found what seem to us to be some very forceful arguments in favor of our position, in two dissenting opinions in the case of O'Neil vs. Vermont, 144 U. S. 323. This case appears to have been brought to this Court upon a writ of error to the State Supreme Court, and the writ was dismissed for the want of jurisdiction, the Court holding that no Federal question had been properly presented by the record. The Court therefore expressed no opinion upon the merits of the case. The late Mr. Justice Field in a dissenting opinion said, page 360 *et. seq.*:

"The Eighth Amendment of the Constitution of the United States, relating to punishments of this kind, was formerly held to be directed only against the authorities of the United States, and as not applicable to the States. Such was undoubtedly the case previous to the Fourteenth Amendment, and such must be its limitation now, unless exemption from such punishment is one of the privileges or immunities of citizens of the United States, which can be enforced under the clause, declaring that no state shall make or enforce any law which shall abridge those privileges

or immunities. In *Slaughter House* cases, 16 Wall. 36, it was held that the inhibition of that Amendment was against abridging the privileges or immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the states. Assuming such to be the case, the question arises: What are the privileges and immunities of a citizen of the United States which are thus protected? These terms are not idle words to be treated as meaningless and the inhibition of their abridgment as ineffectual for any purpose, as some would seem to think. They are of momentous import and their inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible state invasion. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States but after much reflection, I think the definition given at one time before this Court, by a distinguished advocate—Mr. John Randolph Tucker, of Virginia—is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States. This definition is supported by reference to the history of the first ten Amendments to the Constitution, and of the Amendments which followed the late civil war. The adoption of the Constitution, as is well known, encountered great hostility from a large class, who dreaded a central government as one which would embarrass the states in the administration of their affairs. They contended that the powers granted to the proposed government were not sufficiently guarded, and might be used to en-

croach upon the liberties of the people. In the conventions of some of the states which ratified the Constitution a desire was expressed for amendments declaratory of the rights of the people and restriction of the powers of the new government in order, as stated at the time, to prevent misconception or abuse of its powers. The desire thus expressed subsequently led to the adoption of the first ten Amendments. Some of these contain specific restrictions upon Congress, as that it shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Some of them impliedly restrict the powers of Congress in prescribing or construing particular modes of procedure, such as require a presentment or an indictment of a grand jury for the trial of a capital or otherwise infamous crime, and the one that provides, that in suits at common law, where the value involved exceeds twenty dollars, the right of trial by jury shall be preserved. Some of them are declaratory of certain rights of the people which cannot be violated, as their right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that no one shall be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself; that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; and to be informed of the

nature and cause of the accusation and to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and that excessive bail shall not be required, nor cruel and unusual punishments inflicted.

"The rights thus recognized and declared are rights of citizens of the United States under their Constitution which could not be violated by Federal Authority. But when the late civil war closed, and slavery was abolished by the Thirteenth Amendment, there was legislation in the former slave-holding states inconsistent with these rights, and a general apprehension arose in a portion of the country—whether justified or not is immaterial—that this legislation would still be enforced and the rights of the freedmen would not be respected. The Fourteenth Amendment followed, which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. The freedmen thus become citizens of the United States, and entitled in the future to all the privileges and immunities of such citizens. But owing to previous legislation many of these privileges and immunities, if that legislation was allowed to stand, would be abridged; therefore in the same Amendment by which they were made citizens, it was ordained that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' thus nullifying existing legislation of that character, and prohibiting its enactment in the future.

"While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruitions in such limitations are applicable only to the Federal Government and not to the states, yet, so far as they declare or recognize the rights of the persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon State power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both State and Federal action. The State cannot apply to him any more than the United States the torture, the rack or thumb-screw, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment. The inhibition by that amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the Constitutions of the several states. The amendment only gives additional security to the rights of the citizen. It was natural that it should forbid the abridgment by any state of privileges and immunities which the Constitution recognized and guaranteed

as rights of citizens of the United States. A similar additional guaranty of private rights is found in other instances. An Inhibition is contained in the several State Constitutions against their legislatures passing a Bill of Attainder or an *ex post facto* law, and yet a like inhibition against State action is embodied in the Constitution of the United States."

The last observation is illustrated by the Constitution of Utah, which provides, Section One, Article Eighteen:

"No bill of attainder, expost facto law, or law impairing the obligation of contracts shall be passed."

And yet, the Supreme Court of the State upheld the validity of a law requiring men to be tried by eight jurors for felonies alleged to have been committed under Territorial Government, when no such trial could be had except by twelve jurors. The trouble with them is, they do not seem to know what an *ex post facto* law is, when they see it.

Coming back to the O'Neil case, we wish to call attention to the language used by Mr. Justice Harlan in a dissenting opinion in which Mr. Justice Brewer concurred. He said at page 370:

"I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment,

not one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a state in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the Convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief encouraged by its leading advocates, that, immediately upon the organization of the government of the Union, Articles of amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property, which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the states. A judgment, therefore, of a State Court even if rendered pursuant to a statute, inflicting or allowing the infliction of a cruel and unusual punishment is inconsistent with the Supreme law of the land."

The plaintiff respectfully submits that his contention is not inconsistent with the decision of this court in the case of Hurtado vs. California 110 U. S. 516, so far as his objection to the validity

of the procedure against him by information is concerned.

As we understand that case, the only point raised by Hurtado was, that, trying him upon an information was not *due process of law*, and the court held that his contention was not good. He never claimed immunity under the Fifth and Fourteenth Amendments of the Constitution of the United States. In this case we say, that the plaintiff has been denied the privileges and immunities guaranteed him by both the Fifth and Sixth Amendments as enlarged by the Fourteenth.

It seems clear, that if the State has the power to reduce the number of jurors in cases of felony from twelve to eight it has the power to abolish jury trial altogether. The jury is not a stick to be whittled away little by little, till none remains.

We have searched in vain in the Constitution and statutes of the United States to find any definition for the term "jury." Everybody in the United States, outside of Utah, seems to know what a jury is, while here we do not seem to know, nor to have the ability to learn.

Each lesson we get in that direction costs some victim a weary wait in the penitentiary, be-

sides all the money he has. The learned Supreme Court of Utah say, in their opinion in this case, in the tenth line from the bottom of page 9 of the printed record:

> The system of twelve jurors in criminal cases, not capital, and in civil cases has been discarded in many states and a less number provided, with the right in civil cases to a two-thirds majority verdict, and these changes have been sustained by decisions of courts of the highest authority.

This statement is absolute, but we must confess our inability to locate any of these same innovations. We have heard it rumored that in Louisiana some such change has been made, but if so it is in a later edition of the State Constitution than we have been able to procure. We shall believe this story when the authorities are cited and verified. We believe that no state in the Union except Utah has attempted to deprive persons charged with a felony of jury trial. By the tenth section of Article One of the Constitution of Utah, it is only in *capital* cases, that *trial by jury is to remain inviolate.* If the state be permitted to reduce the number of jurymen from twelve to eight, why should it not be permitted to reduce that eight to three, and finally to do away with all pretence of jury trial? Unless the individual can find protection in the Sixth and Fourteenth Amendments to

the Federal Constitution, what is there to hinder Utah from trying men charged with capital offenses, before a Justice of the Peace or the town Sexton? These amendments either afford protection or they afford no protection. They either preserve the right of trial by jury—such a jury as has always been recognized at the Common Law, —or they say the right to trial by jury is not one of those fundamental safeguards for the protection of the individual citizen, that was centemplated in the Bill of Rights. What more valuable institution have we as the fruit of the Anglo-Saxon struggle against tyranny during all the ages?

If the right to trial by jury is not a fundamental right that belongs to citizens of the United States, and that too of sufficient importance to claim and obtain a place under the protecting ægis of the Constitution of the United States, it would seem difficult indeed to discover a right that can claim that distinction. The verdict of a jury in the trial of the Seven Bishops, carried more consternation to the heart of James II of England, than the failure of any and all of his other measures of attempted lawlessness. That verdict was a new Declaration of Independence along the lines of Magna Charta, and ought to be hailed in every age as a new inspiration to the

people to keep alive an institution that has so many times been their last bulwark against a rising tyranny. When that same despicable tyrant heard the triumphant shout of the people on learning the verdict of that same jury he asked, "What is that?" "It is nothing," was the reply, "only the soldiers are glad that the Bishops are acquitted!" "Do you call that nothing?" grumbled the King. *He* saw in it death to his attempts to trample upon the rights of the people. And yet, in this opinion of the Supreme Court of Utah we are gravely informed, that notwithstanding one-third of the jury has been taken away from the plaintiff in error, he has suffered no diminution of his constitutional rights. Surely this opinion does not correctly state the law.

The Supreme Court of Utah said in the case of The State vs. Bates, 14 Utah 293, at page 301: "If a jury of eight men is as likely to ascertain the truth as 12, that number secures the end." Could not one man do as well? Is this argument not equivalent to saying that if one man is as likely to ascertain the truth as twelve, that he alone secures the end? Again, if the number of jurors may be changed, why may not the quality also? Why not say that the relatives of the injured party in any case shall be permitted to dis-

pose of the person and effects of the accused as they may deem proper? So long as every accused person is subjected to an equal degree of vengeance on the part of his victim's friends he is being disposed of by ~~one~~ due process of law as defined by the Supreme Court of Utah. By their definition equal injustice is as much due process of law, as equal justice. Equality and uniformity are the only requisites.

The Plaintiff in Error also says, THAT HE IS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW. He claims that the words, "due process of law," had, at the time they were incorporated into the Fourteenth Amendment, a well understood and defined meaning. In no state of the Union at that time, could any person be deprived of life, liberty, or property, by *any State*, except after a trial and conviction by a jury, which jury was never composed of less than twelve persons.

The purpose of this Amendment in this particular seems to have been to throw around the individual a permanent protection against the consequences of hasty and ill-considered legislation, as well as against arbitrary acts of official violence. Judge Cooley, in his work on Constitutional Limitations, p. 356 (Star page,) says:

"The principles, then, upon which the process is based are to determine whether it is due process or not, and not any consideration of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.

"When the government through its established agencies interferes with the title of one's property or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before disposition; but when property is appropriated by the Government to public uses, or the legislature interferes to give direction to its title through remedial Statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

"*Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizens.*"

Can it be seriously contended, that a law of a state, which abolishes trial by jury in cases of felony, is a law "with due regard to the landmarks established for the protection of the citizen? If trial by jury be not a landmark established for the protection of the citizen, pray, what would be such a landmark?

"*Due process of law in each particular case means, such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.*"

We say that trial by jury was always prescribed in cases of felony, to which class the plaintiff's case unmistakably belongs. What more precious right have we than the right of trial by jury in cases involving the liberty of the citizen? What higher right could the Federal Constitution lend its aid to preserve? Of what use to us are all our other privileges, if this one, which marks the line between the Anglo-Saxon and the rest of

the world, is left unprotected against the assaults of the whims and caprices of a body of men who, without ever having studied the principles of liberty and freedom or the means of protecting the institutions of the country, for one single hour, are intrusted by the people with the powers of making statutes and constitutions? We can already hear the advocates of this monstrosity exclaim: "The people of the state can always be trusted to protect the rights of citizens?" Then why was the Fourteenth Amendment adopted? Every state is supposed to have one lucid interval in which it sits down deliberately to protect itself from itself by putting up barriers, which no sudden burst of passion in the people can over-ride. In Utah, they have torn up the barrier by the roots, and left the citizen clinging only to the solid foundations of liberty as they are found in the Federal Constitution, far removed from the influence of the inexperienced novice at Constitution-building. His trust in that refuge is on trial in this case. For if in the Constitution and laws of Utah only he has hope of safety, he is of all men most miserable. That flower has become ashes in his hand. That stay has been snapped in the first breeze of adversity. That hope that a man

ought to realize in relying on the State Constitution is turned to the deepest despair, and the light that ought to shine out like a beacon, has become the densest darkness, and he must find an anchor in the Constitution of the United States, or drop down into the abyss, crying as he falls, that after all, the loud sounding claim of Americans, that they are secure against chaos, is a lie.

The words "due process of law," were undoubtedly intended, said this Court, in Murray's Lessees vs. Hoboken, etc., 18 Howard, to convey the same meaning as the words "by law of the land," in Magna Charta.

In the case of Jones vs. Robbins, 8 Gray, 329, the Supreme Judicial Court of Massachusetts, in passing upon the question whether a statute, which gave a single magistrate authority to try an offense punishable by imprisonment, in the State Prison, without the presentment of a grand jury, violated that provision of the State Constitution which declared that "no man shall be arrested, imprisoned, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land," speaking by Chief Justice Shaw, said:

"This clause, in its whole structure, is so

manifestly conformable to the words of Magna Charta, that we are not to consider it as a newly invented phrase first used by the makers of our Constitution, but we are to look at it as the adoption of one of the great securities of private right, handed to us among the liberties and privileges which our ancestors enjoyed at the time of their emigration and claimed to hold and retain as their birthright.

"These terms in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of their trial, because the laws may be shaped and altered by the legislature, from time to time; and such a provision, intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The legislature might simply change the law by statute, and thus remove the land mark and the barrier intended to be set up by this provision in the Bill of Rights. It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England before the settlement of this country, and the emigrants themselves and their descendents had found safety for their personal rights."

After showing that "law of the land," as used in Magna Charta and in the Constitution of Massachusetts, has the same meaning as "due process of law," and after stating that the people of the original States deemed it essential for the better security of their rights of life, liberty and proper-

ty, that their constitutions should set forth and declare the fundamental principles of free government, the opinion proceeds:

"Most of the state constitutions did contain these declarations, more or less detailed and explicit; but the general purpose was to assert and maintain the great rights of English subjects, as they had been maintained by the ancient law, and the actual enjoyment of civil rights under them. 'The sense of America was,' says Chancellor Kent, 'more fully ascertained, and more explicitly and more solemnly promulgated, in the memorable Declaration of Rights, of the first Continental Bill of Rights, in October, 1774, and which was a representation of all the states except Georgia. That declaration contained the assertion of several great and fundamental principles of American liberty, and it constituted the basis of those subsequent bills of rights which under various modifications, pervaded all our Constitutional Charters."

2 Kent, 5, 6.

The heresy that trial by jury is mere procedure as held by the Supreme Court of Utah in the case of the State vs. Bates 14 Utah 293, and in the State vs. Thompson, 15 Utah, 488, met its death blow in the decision of this Court in the case of

Thompson vs. Utah, 170 U. S., 343.

For an exhaustive discussion of the doctrine of "due process of law," I know no better article

than the dissenting opinion of Mr. Justice Harlan in the case of

Hurtado vs. California, 110, U. S. 538.

The contention of plaintiff in error is not for a mere shadow, but for a substantive right, that cannot be lightly disregarded. If trial by jury in cases of felony can be brushed away like cobwebs, nothing is safe. While the Supreme Court of Utah has laid to itself the flattering unction that it has preserved trial by jury because it has given eight jurors in lieu of twelve, it is the beginning of the end of all pretense of jury trial. Upon this phase of the question, I feel like quoting the words of Mr. Guthrie of the New York Bar, where he says:

"When a Constitutional right is invaded, we are not bound to stand silent so long as moderation is practiced. There can be no greater political blindness, no more dangerous policy, than to sanction the invasion of constitutional rights because the particular instance is in itself apparently harmless or seems expedient. Admit the wedge ever so little, and there is nothing to prevent its being driven home. We are not compelled to wait until the unconstitutional measure becomes ruinous confiscation or an intolerable interference with personal liberty. In respect of Constitutional guarantees we have a right to expect absolute security and protection, and the courts are under a duty to enforce the Constitutional provisions guar-

anteeing our rights wholly irrespective of the degree of their infringement. Present inconvenience, however great, present expediency however tempting, can never justify the slightest disregard of any provision of the Constitution. It is ever the moderate and light invasions of Constitutional rights, that are the most dangerous. As was said in a leading case: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to the gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.'

"*Mr. Justice Bradley in Boyd vs. United States, 116, U. S. 616, 635.*

"As to our Constitutional rights, eternal vigilance and uncompromising enforcement must be our rule of conduct if we are to preserve and perpetuate American Constitutional institutions. We should never tolerate any infringement of Constitutional rights, no matter how slight or trivial. Toleration of even insignificant violations of Con-

stitutional rights serves to weaken our sense of those rights."

Guthrie on Fourteenth Amendment, pp. 40, 41.

Section 4516, Revised Statutes of Utah, which went into effect January first, 1898, provides:

"No person shall be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the Court, or upon a plea of guilty, or upon a judgment against him upon a demurrer when he refuses to plead, or upon a judgment of a court for a public offense not amounting to a felony, a jury having been waived."

Section 4810. R. S., is as follows:

"Issues of fact must be tried by a jury, unless a trial by jury be waived in criminal cases not amounting to felony by the consent of both parties expressed in open court and entered on its minutes."

So that it cannot be claimed by the defendant in error that the plaintiff ever waived a trial by jury, since under the statutes he could not do so.

Cancemi vs. The People 18, N. Y., 128.

Territory of Montana vs. Ah Wah, 1 Pac. Rep. 732.

Thompson vs. Utah, 170, U. S. 343, 353.

We respectfully submit that the Supreme Court of Utah erred in denying plaintiff's contention that he is deprived of his liberty in violation

of the Constitution of the United States in the particulars hereinbefore set forth.

That Court erred in refusing to restore the plaintiff to his liberty, and in their said judgment they have plainly violated plaintiff's privileges and immunities as a citizen of the United States, by proceeding against him on a charge of robbery, otherwise than by presentment or indictment of a grand jury, and by trying and convicting him and imprisoning him on the verdict of eight persons instead of a jury, all of which is in violation of his rights as secured to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and that imprisoning him on the verdict of eight persons only instead of a jury, deprives him of his liberty without due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Wherefore, he prays that said judgment may be reversed and that he be restored to his liberty.

J. W. N. Whiteman

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 384.

Brief of Bishop for D. E.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Dec. 4, 1899.

OCTOBER TERM, 1899.

No. 384.

CHARLES L. MAXWELL, PLAINTIFF IN ERROR,

vs.

GEORGE N. DOW, AS WARDEN OF THE UTAH STATE PRISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

ALEXANDER C. BISHOP,
Attorney General,

WILLIAM A. LEE,
Deputy Attorney General,
For Defendant in Error.

25 Copies Filed _____ *1899.*

_____ *Clerk.*

(17,498)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

CHARLES L. MAXWELL,
Plaintiff in Error,
vs.
GEORGE N. DOW, as Warden of the Utah State Prison,
Defendant in Error.

No. 384.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This case was originally commenced in the Supreme Court of the State of Utah. The plaintiff in error filed a petition for a writ of habeas corpus, alleging that he was unlawfully imprisoned and restrained of his liberty by the defendant in error, for the following reasons:

1. Holding him to answer for the crime of robbery, except on a presentment or indictment of a grand jury, abridges his privileges and immunities as a citizen of the United States as guaranteed by Art. 5 of the amendments to the Constitution of the United States.

2. Trying him by a pretended jury of only eight persons abridges his privileges and immunities as a citizen of the United States as guaranteed by Art. 6 of the amendments to the Constitution of the United States.

3. That a trial of said petitioner by a pretended jury of only eight persons, and upon a verdict of guilty by said persons, imprisoning him in the said prison, is depriving him of his liberty without due process of law, and is in violation of his rights as guaranteed by Sec. 1 of Art. 14 of the amendments to the Constitution of the United States.

4. That Sec. 10 of Art. 1 and Sec. 13 of Art. 1 of the Constitution of the State of Utah, compelling him to be tried for a felony, except by a jury composed by twelve persons, and holding him to answer for a charge of felony, to-wit: robbery, except upon a presentment or indictment of a grand jury, abridge his privileges and immunities as a citizen of the United States; said Sec. 10,

compelling him to be tried by only eight persons instead of a jury, deprives him of his liberty without due process of law: and said sections are in contravention of Sec. 1 of Art. 14 of the amendments to the Constitution of the United States.

In the return made by the defendant in error, it is alleged that the detention of the said plaintiff in error is under authority and by virtue of the judgment and commitment complained of, and that the said detention is not in any manner illegal or unlawful; and that the matters and things alleged in said petition are not sufficient in law, and do not constitute any reason in law why said plaintiff should be discharged.

Upon the issues thus formed, the case was duly argued and submitted at the May term, 1899, and on the first day of June thereafter, the said court rendered its decision therein, to the effect that the writ of habeas corpus as prayed for, be denied; whereupon the plaintiff brings the case to this court upon writ of error to the Supreme Court of Utah.

In the petition of the plaintiff in error, the following errors are assigned and complained of:

1. The said court erred in upholding the validity of Sec. 10 of Art. 1 of the Constitution and laws of the State of Utah, providing that a

jury for the trial of felonies should be composed of eight persons only, in cases not capital.

2. The said court erred in deciding that trying the plaintiff herein upon a charge of robbery, which by the laws of the State of Utah is a felony, and upon a verdict of guilty, imprisoning him in the penitentiary for eighteen years, is not depriving him of his liberty "without due process of law."

3. The said court erred in deciding that said Sec. 10 of Art. 1 of the Constitution of the State of Utah, and the laws of the State made in pursuance thereof, do not abridge plaintiff's privileges and immunities as a citizen of the United States as guaranteed to him by the sixth and fourteenth amendments to the Constitution of the United States.

4. The said court erred in deciding that in holding the plaintiff to answer to a charge of robbery, unless upon a presentment or indictment of a grand jury, does not abridge his privileges and immunities as a citizen of the United States as guaranteed by the fifth and fourteenth amendments to the Constitution of the United States.

5. The said court erred in deciding that plaintiff was not entitled to be discharged from his imprisonment.

INTRODUCTORY.

For the first time in its history, this court is called upon to determine whether or not a State, by constitutional provision, can reduce a trial jury to a number less than twelve in felony cases, without infringing the provisions of the Federal Constitution.

Since the admission of the State of Utah into the Union, all prosecutions for felonies, except capital cases, have been tried by a jury of eight persons.

Of the one hundred and fifty-eight prisoners now confined in the State Prison of this State, one hundred and thirty-three are held under judgments of conviction similar to that of the plaintiff in error, all of which must, of necessity, abide the decision in this case. It is therefore a matter of grave importance to the State of Utah, affecting as it does both public and private rights and interests of great magnitude. The question is also one of profound interest and far reaching importance in its bearing upon the relations of the United States and of the several States to each other and to the citizens of the States and the United States.

While the serious consequences which will

result in sustaining the contention of the plaintiff in error are not, of themselves, sufficient reasons for upholding the validity of a provision of a state constitution which otherwise might deprive a person of his liberty without due process of law, or deprive him of substantial rights as a citizen of a State or of the United States, it is a reason so grave, and the results that must follow such a holding are of such paramount importance, as to command the most earnest consideration and serious thought.

Before proceeding to the argument of this case, it may be well to state our position with reference to the questions involved, and the theory upon which we shall present them to this court.

1. Prior to the adoption of the fourteenth amendment, courts had universally held the first eleven amendments of the Constitution to be limitations upon Federal power only, and not limitations upon the powers of a State.

2. The right guaranteed by the fifth amendment to the Constitution of the United States, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; and the right guaranteed by the sixth amendment, that in all criminal prosecutions the accused shall enjoy

the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed, are not privileges or immunities of national citizenship, which the States are forbidden by the fourteenth amendment to abridge.

3. That Sec. 10 of Art. 1 of the Constitution of the State of Utah, which provides that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors, does not infringe that clause of the fourteenth amendment to the Constitution of the United States relating to "due process of law."

ARGUMENT.

I.

Prior to the adoption of the fourteenth amendment, courts had universally held the first eleven amendments of the Constitution to be limitations upon Federal power only, and not limitations upon the power of a state.

In support of the above proposition, it is sufficient to cite the decisions of this court, beginning as far back as 1833, and numerous decisions following which have unequivocally adhered to that holding.

Barron v. Baltimore, 7 Pet., 247.

Livingstone v. Moore, 7 Pet., 551.
Holmes v. Jennison, 14 Pet., 540.
Fox v. Ohio, 5 How., 434.
Smith v. Maryland, 18 How., 71.
Pervear v. Commonwealth, 5 Wall., 475.
Twitchell v. Commonwealth, 7 Wall., 326.
Justices v. Murray, 9 Wall., 274.

It may be of interest to refer to some of the decisions of the state courts in which the same doctrine has been announced.

Buonaparte v. Camden and Amboy R. R., Baldw., 220.
James v. Commonwealth, 12 S. and R. 220.
Barker v. People, 3 Cow., 686.
Colt v. Eves, 12 Conn., 243.
Jane v. Commonwealth, 3 Met. (Ky.), 18.
Lincoln v. Smith, 27 Vt., 328.
Matter of Smith, 10 Wend., 449.
State v. Barnett, 3 Kan., 250.
Reed v. Rice, 2 J. J. Marsh, 45.
S. C. 19 Am. Dec., 122.
North. Mo. R. R. Co. v. Maguire, 49 Mo., 490.
Lake Erie R. R. Co. v. Heath, 9 Ind., 558.
Prescott v. State, 19 Ohio St., 184.

State v. Shumpert, 1 So. Car., 85.
Commonwealth v. Hitchings, 5 Gray, 482.
Bigelow v. Bigelow, 120 Mass., 320.
Boyd v. Ellis, 11 Iowa, 97.
Campbell v. State, 11 Ga., 353.
State v. Carro, 26 La., Ann. 377.

II.

The right guaranteed by the fifth amendment to the Constitution of the United States, that no person shall be held to answer for a capital of otherwise infamous crime unless on a presentment or indictment of a grand jury; and the right guaranteed by the sixth amendment, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed, are not privileges or immunities of national citizenship, which the States are forbidden by the fourteenth amendment to abridge.

In the consideration of constitutional provisions, and especially amendments to the original instrument, it is always of great assistance in determining their meaning to ascertain the reason for their adoption. With a view of throwing light upon the construction to be placed upon the con-

stitutional amendments under consideration, and particularly the fourteenth amendment, the substance of a brief history of their purpose and of the events leading up to their adoption, as admirably set forth by Mr. Justice Miller in Slaughter House cases, 16 Wall., 36, may here be given.

The first twelve articles of amendment to the Federal Constitution were added so soon after the organization of the government as to make them practically contemporaneous with the adoption of the instrument itself. No further amendments were made until between 1865 and 1869, when the thirteenth, fourteenth and fifteenth articles were added. The most cursory glance at these articles, when taken in connection with the history of the times, discloses the primary object of their adoption, and reflects much light upon questions of doubt as to their true meaning.

On account of African slavery, which had existed since before the organization of the government, and which had been recognized by the Constitution as a part of our institutions, the war of the Rebellion was brought on. For whatever auxiliary causes may have contributed to this result, the over-shadowing cause was human slavery. In that struggle slavery, as a legalized social

institution, perished by reason of the bitterness and force of that conflict. At the close of the war, when Federal authority had been re-established over the rebellious States, those in authority decided to incorporate into the supreme law of the land such amendments as would forever secure the results of the war, and guarantee to the emancipated freeman, equal rights to protection with his white brother.

It will not be contended for a moment that these provisions of the Constitution apply only to the colored man, for the language is general and broad enough, and was intended to apply alike to all citizens and subjects of the Federal government. That the primary and principal purpose of their adoption was designed to secure to the colored race the enjoyment of all the civil rights enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States, cannot be doubted.

The statesmen of the Nation have always divided on the line which separates the powers of the National Government from those of the State government, and the adoption of the first eleven amendments to the Constitution shows a prevailing sense of danger at that time from the encroach-

ment of Federal power, notwithstanding all the pressure growing out of the existing feeling during the war; and our greatest statesmen still believe that the existence of States with powers for domestic and local government, including the regulation of civil rights, the rights of persons and of property are an essential part of our complex form of government.

In discussing the amendments to the Constitution of the United States, and the rule of construction applicable thereto, Mr. Cooley, in his work on Constitutional Limitations, (5th Ed.) Chap. 2, p. 26; star p. 19, says:

> "The tenth amendment to the Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. And it is to be observed of this instrument, that being framed for the establishment of a national government, it is a settled rule of construction that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the States are expressly mentioned. As illustrations, the sixth and seventh amendments to the Constitution may be mentioned. These

> constitute a guarantee of the right of trial by jury, but as they do not mention the States, they are not to be understood as restricting their powers; and the States may, if they choose, provide for the trial of all offenses against the states, as well as for the trial of civil cases in the state courts, without the intervention of a jury, or by some different jury from that known to the common law. (Citing.)
>
> Twitchell v. Commonwealth, 7 Wall., 321.
> Justices v. Murray, 9 Wall., 274.
> Edwards v. Elliot, 21 Wall., 532.
> Walker v. Sauvinet, 92 U. S., 90.
> Munn v. Illinois, 94 U. S., 113.
> McElrath v. United States, 102 U. S., 426.
> United States v. Cruikshank, 92 U. S. 542.
> Holmes v. Jennison, 14 Pet., 540.
> Presser v. Illinois, 116 U. S., 252.

Referring to the fourteenth amendment, the same author on p. 359, star p. 294, says:

> "The most important clause in the fourteenth amendment is that part of Sec. 1, which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the State wherein they reside. This provision very properly puts an end to any question

> of the title of the freedmen and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions; though as a principle of state constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by state laws is complained of, inasmuch as the decisions of the state courts upon laws which are supposed to violate it will be subject to review in that court on appeal."

This distinction is referred to as being in line with the decisions of this court, to which we shall hereafter refer.

And again, in discussing the meaning to be attached to the phrase "privileges and immunities" as used in the fourteenth amendment, the same author, p. 491, star. p. 397, says:

> "Although the precise meaning of 'privileges and immunities' is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States, the right to remove to, and carry on business

therein; the right by the usual modes to acquire and hold property therein, and to protect and defend the same in law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to. To this extent, at least, discrimations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon actual residence; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. * * * * * It was not within the power of the States before the adoption of the fourteenth amendment to deprive citizens of the equal protection of the laws: but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted: and the same securities which one citizen may demand, all others are now entitled to."

In re Kemmler, 136 U. S., 448, the court, speaking through Mr. Chief Justice Fuller, declared:

> "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily with the States, and the amendment furnishes an additional guarantee against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it, but those are privileges and immunities arising out of the nature and essential character of the national government, and guaranteed and secured by the Constitution of the United States."

The first time this court was called upon to construe the provisions of the fourteenth amendment was in the Slaughter House cases, supra. Mr. Justice Miller, speaking for the court, said:

"It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances of the individual.

We think this distinction, and its explicit recognition in this amendment, of great weight in this argument, because the next paragraph in this same section, which is the one mainly relied upon by the plaintiff in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiff rests wholly on the assumption that the citizenship is the same, and the privileges and immunities granted by the clause are the same.

The language is 'no State shall make or enforce any law which will abridge the privileges and immunities of a *citizen of the United States*.' It is a little remarkable if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseo-

> logy was adopted understandingly, and with a purpose.
>
> Of the privileges and immunities of a citizen of the United States, and of the privileges and immunities of a citizen of the States, and what they respectively are, we will presently consider. But we shall state here that it is only the former which are placed, by this clause, under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of a State as such, the latter must rest for their security and protection where they have heretofore rested, if they are not embraced by this paragraph of the amendment."

And further on in the same opinion the learned Justice continues:

> "It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent amendments, no claim or pretense was set up that those rights, (privileges and immunities of citizens of the States) depended on the Federal government for their

> existence and protection, beyond the very few express limitations which the Federal Constitution imposed upon the States; such for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. * * * But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteeenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"

In Missouri v. Lewis, 101 U. S., 22, the plaintiff in error contended that the judicial system of Missouri was in conflict with the fourteenth amendment to the Constitution of the United

States, because it denied to suitors in the courts of St. Louis and other counties named, the equal protection of the laws, in that it denied to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

After commenting upon the effect which should be given to the fourteenth amendment respecting the subject matter, Mr. Justice Bradley, speaking for the court, said:

> "We might go still further, and say with entire truth that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature which it sees fit, for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its methods of procedure for New York City, and the surrounding counties, and the common law and its methods of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent it from so doing."

And further on in the opinion he says:

> "The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in this respect may

> exist in two States separated only by an imaginary line; on one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial procedure."

And the court further says, (p. 32):

> "If a Mexican state should be acquired by treaty, and added to an adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue in one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the fourteenth amendment."

If any of the rights, privileges and immunities guaranteed by the fifth, sixth and seventh amendments to the Federal Constitution are such rights, privileges and immunities of national citizenship as the States are forbidden by the fourteenth amendment to abridge, then it necessarily follows that all the rights, privileges and immunities enumerated in these several amendments would come within such inhibition. So, too, the con-

verse of this proposition would be true, and none of such rights, privileges and immunities enumerated therein could be regarded as coming within the provisions of the fourteenth amendment. They are all alike. and all involve the same principle. Whatever of argument or authority that is applicable to one, to show that the rights, privileges and immunities it contains are not such as the states are forbidden to abridge, are equally applicable to all.

If it has been decided, since the adoption of the fourteenth amendment that the provisions of the seventh amendment do not apply to state courts, then we submit that such decisions are authority in support of the doctrine that the provisions of the fifth and sixth amendments are limitations upon Federal powers only, and not limitations upon the powers of the States. There are a number of such decisions, which not only re-affirm prior decisions as to the scope and effect of the first eight amendments, but in considering the construction to be placed upon the fourteenth amendment, this court has repeatedly held that the rights, privileges and immunities guaranteed by the first eight amendments to the Federal Constitution are not such rights, privileges or immunities of national citizenship as the states are for-

bidden by the fourteenth amendment to the Constitution of the United States to abridge.

In Edwards v. Elliott, 21 Wall., 532, it was held that the provisions of the seventh amendment to the Constitution, which secures to every party the right to trial by jury where the amount in controversy exceeds twenty dollars, does not apply to trials in state courts.

In Walker v. Sauvinet, 92 U. S., 90, which involved the same question as in the last case cited, Mr. Chief Justice Waite uses this language:

> "By Article 7 of the amendments, it is provided that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States." [Citing.]
>
> Edwards v. Elliott, 21 Wall., 557.

> "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law, pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment to abridge. A state can-

> not deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Federal Constitution is met if the trial is due according to the settled course of judicial proceedings."

In Pearson v. Yewdall, 95 U. S., 294, the chief justice again says:

> "We have held over and over again that Article 7 of the amendments to the Constitution of the United States relating to trials by jury, applies only to courts of the United States."

In line with this doctrine, is the case of Spies vs. Illinois, 123 U. S. 166, in which the court says:

> "That the first ten articles of amendment were not intended to limit the powers of state governments in respect to their own people, but to operate on the national government alone was decided more than one-half a century ago, and that decision has been steadily adhered to since."

If, in the light of the foregoing authorities, there still could be any question that the first eight amendments to the Constitution have been

held by this court to be limitations upon Federal powers only, and that the provisions of the fourteenth amendment do not render them applicable to States, such question is effectually settled in Ellenbecker v. Plymouth County, 134 U. S., 31.

This was a writ of error to the Supreme Court of the State of Iowa, and involved the legality of a judgment imposing a fine of five hundred dollars and costs, on each of the six plaintiffs in error, and imprisonment in the jail of Plymouth County for a period of three months, as a punishment for contempt in refusing to obey a writ of injunction issued by the court.

The errors assigned were:

1. That the Supreme Court of Iowa failed to give effect to Clause 3 of Sec. 2 of Art. 3 of the Constitution of the United States, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury. Also to the provisions of Art. 6 of the amendments to the Constitution, which provide that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

2. That the Supreme Court erred in holding that the plaintiff could be fined and imprisoned without first being presented by a grand jury, and could be tried on ex parte affidavits, which decision

it was said is in conflict with, and contrary to the provisions of both Articles 5 and 6 of the amendments to the Constitution of the United States. The latter of which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him.

4. That the Supreme Court erred in not holding that the laws of Iowa were in conflict with Art. 8 of the amendments to the Constitution of the United States, which provides that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

Mr. Justice Miller, speaking for the court in disposing of these three assignments of error, says:

> "The first three of these assignments of error, as we have stated them, being the first, second and fourth assignments, as numbered in the brief of the plaintiff in error, are disposed of at once by the principle often decided by this court, that *the first eight articles of the amendments to the Constitution have reference to the powers exercised by the government of the United States and not to those of the States.*
>
> Livingston v. Moore, 7 Peters, 469.
> The Justices v. Murray, 9 Wall, 274.

Edwards v. Elliott, 21 Wall, 532.
United State v. Cruikshank, 92 U. S., 542.
Walker v. Sauvinet, 92 U. S., 90.
Fox v. Ohio, 5 How, 410.
Holmes v. Jennison, 14 Pet., 540.
Presser v. Illinois, 116 U. S., 252."

Further on the learned justice says:

> "The limitations, therefore, of Articles five and six and eight of those amendments, being intended exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as limitations upon the powers of the States, can have no application to the present case."

The above authorities conclusively show that the rights, privileges and immunities guaranteed by the fifth and sixth amendments to the Federal Constitution are not such rights, privileges or immunities of national citizenship as the States are forbidden by the fourteenth amendment to abridge.

A careful examination of the decisions of this court clearly show the theory upon which they are based, and the distinctions which are therein made

between the privileges and immunities of citizens of the States and those of the United States. That the protection of the former rests primarily with the States, while those of the latter rest with the United States. That while the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are protected by the fourteenth amendment, it must be remembered that they are only such privileges and immunities as arise out of the nature and essential character of national government. This line of distinction has been clearly marked along the boundaries of their respective spheres of action, and the two classes are as different in their natures as are the functions of their respective governments. Among the rights accorded to a citizen of the United States as such may be mentioned that of participating in foreign and inter-state commerce, the right to have the benefit of the postal laws, to make use, in common with others, of the navigable waters of the United States, to pass from state to state, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws.

Story on the Constitution, (4th Ed.) Sec. 1937.

So too, a citizen of the United States, as such, has the right to petition the Federal Government in respect to any matter of public concern; he may also examine public records of Federal jurisdiction, and visit the seat of government without being subjected to the payment of a tax for the privilege.

Crandall v. Nevada, 6 Wall., 35.

He may become the purchaser of public lands on the same terms with others; may participate in the government, if he comes within the conditions of sufferage, and may demand the care and protection of the United States when on the high seas or within the jurisdiction of a foreign government.

Slaughter House Cases, 16 Wall., 36.

Wherever it is the duty of the United States to give protection to a citizen against harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to Federal citizenship. The general rule respecting privileges and immunities of a citizen of the United States is said to be that whatever one may claim as of right under the Constitution and laws of the United

States by virtue of his citizenship as such, is a privilege of citizenship of the United States, and that whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect thereto.

Slaughter House Cases, 16 Wall., (supra).

Counsel for plaintiff in error, in his brief, speaks of "a wild and untamed spirit of innovation in respect to juries," which he says took possession of the Territorial legislature, and lasted until this court had an opportunity of wiping it out, and that the framers of the Constitution incorporated the heresy in the Constitution. He also challenges the correctness of the statement of the Supreme Court of this State in which it said that the system of twelve jurors in criminal cases not capital, and in civil cases has been discarded in many of the states, and that this change had been sustained by decisions of high authority. Counsel professes his inability to find any such authority. We direct his attention to the case of Gibson v. State, 16 Fla., 291, which sets forth the constitutional provisions of that State adopted in 1875, and the statutory provisions subsequently enacted by the legislature in pursuance thereof,

providing that the number of jurors in all cases other than capital should be six, and upholding a conviction by such a jury, in which that court used substantially the same language as that employed by the Supreme Court in this case. This decision appears to have stood unchallenged for a period of something like twenty years without any citizen of that State having appealed to this court to check the "wild and untamed spirit of innovation in respect to juries," which counsel has seen fit to apply disparagingly to the legislative and judicial departments of the State of Utah.

III.

That Sec. 10 of Art. 1 of the Constitution of the State of Utah, which provides that in courts of general jurisdiction, except, in capital cases, a jury shall consist of eight jurors, does not infringe that clause of the Fourteenth Amendment to the Constitution of the United States relating to "due process of law."

Perhaps no provision of the Federal Constitution has afforded more numerous and important questions for adjudication by the courts than those contained in the Fifth and Fourteenth Amendments relating to "due process of law," and none more difficult of exact and satisfactory definition.

No proposition of law is better settled by judicial determination than that a state may dispense with a grand jury and prosecute for felonies by information instead of by indictment and that this is "due process of law" as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In view of the fact that counsel for plaintiff in error concedes that this court has so decided, we do not deem it necessary to submit any argument or authorities in support thereof.

The constitutional provision of which the plaintiff in error complains is Sec. 10 of Art. 1, which reads as follows:

> "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction, a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous."

Plaintiff in error contends that this provision violates that provision of the Fourteenth Amendment to the Federal Constitution which provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law."

Mr. Justice Matthews, in Hurtado v. California, 110 U. S., 90, in an exhaustive opinion, reviews the authorities from the time of Magna Charta to the present time, as to what is granted by "the law of the land," or "due process of law," which are held to mean the same thing, and he concludes, that:

> 'Any legal procedure enforced by public authority, whether sanctioned by age or custom, or any new law devised in the discretion of the legislative power, in furtherance of the general public good, which requires an observation of these principles of liberty and justice, must be held to be 'due process of law.'"

In that case, this court was called upon for the first time to decide the question as to whether or not a state could prosecute for a capital or otherwise infamous crime, by information instead of by indictment. The Constitution of the State of California, adopted in 1879, in Art. I, Sec. 8, provided that offenses theretofore required to be prosecuted by indictment, should be prosecuted by information, after examination and comittment. Hurtado had been prosecuted in this manner, and convicted of a capital offense. He contended that he had been condemned without "due process of law," and sued out a writ of error from this court

to the Supreme Court of California. He based his claim upon the provisions of the fourteenth amendment.

In Walker v. Sauvinet, supra, the same doctrine is reaffirmed; also in Dent v. West Va., 129 U. S., 114.

Chancellor Kent, (2 Comm.) 13, says that:

> "The better and larger definition of 'due process of law,' is that it means law in its regular course of administration through courts of justice."

The definition given by Mr. Webster in Dartmouth College v. Woodward, 4 Wheat., 519, (Wks. of Webster, Vol. 5, p. 487,) as to what is meant by due process of law, or the law of the land, is stated and approved by Mr. Cooley in his work on Constitutional Limitations, (5th Ed.) 432, star page 354, and is also cited and approved in a large number of cases decided by this court.

> "By the law of the land," says Mr. Webster, "is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immuities under

> the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

Mr. Justice Johnson, in the Bank of Columbia v. Okley, 4 Wheat. 235, says:

> "As to the words of Magna Charta after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The term "due process of law" has been defined to mean a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.

Pennoyer v. Neff, 95 U. S., 714.

Kennard v. Louisiana, 92 U. S., 480.

Hagar v. Reclamation Dist., 111 U. S.,701.

Also any law which operates on all alike, and does not subject the individual citizen to the arbi-

trary exercise of the powers of government, is due process of law within the meaning of the fourteenth amendment to the Constitution.

In re Converse, 137 U. S., 624.
Giozza v. Tiernan, 148 U. S., 657.
Duncan v. Missouri, 152 U. S., 377.
Missouri Pac. R. R. Co. v. Mackey, 127 U. S., 205.
Minneapolis & St. L. R. R. Co. v. Herrick, id. 210.
Leeper v. Texas, 139 U. S., 462.
Barbier v. Connolly; 113 U. S., 27.

A statute which authorizes a person indicted for murder to plead guilty, and empowers the court to determine the degree does not infringe the due process of law clause of the Fourteenth Amendment.

Hallinger v. Davis, 146 U. S., 314.

The words, "due process of law," in the fourteenth amendment, do not necessarily require an indictment by a grand jury in a prosecution by a state for murder, whose constitution authorizes such prosecution by information.

Hurtado v. California (supra).
McNulty v. California, 149 U. S., 645.
Hodgson v. Vermont, 168 U. S., 262.

Many other authorities might be cited in which due process of law is defined, but we do not deem it necessary to extend the list. In the light of those we have cited, and of the settled and approved definitions as to what constitutes due process of law, we may conclude that it does not alone consist in those settled usuages and means of proceeding, existing in the common law of England before the immigration of our ancestors, or even at the time of the adoption of the Federal Constitution. To hold that such characteristics are essential to due process of law, as has been well stated by Mr. Justice Matthews, in Hurtado V. California, supra, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. While we should not be wanting in veneration and respect for those principles which have come down to us from Magna Charta, and the com-

mon law of England, hallowed as they are by time and immemorial usuage, and, by universal consent, adjudged to be the overshadowing factor in causing the Anglo-Saxon to be the foremost race, and to represent the highest and most advanced civilization of the present age, we should not, on the other hand, lose sight of the fact that all law is but the outgrowth of human experience and advancement. For several hundred years, under the common law of England, a man could not testify in his own behalf when accused of crime, though not to be permitted to do so often meant condemnation and death. For many centuries, and up to a comparatively recent date, under the laws of England, more than one hundred offenses were punishable by death. Even in America, death for so-called witchcraft has been inflicted. All this was done when we possessed "the sacred heritage from the ruins of tyranny"—the right to trial by a common law jury. Who can say that we have reached a position from which no further development can be made, providing it is made along the line of experience, and in harmony with the great and immutable principles of justice.

The law under which petitioner was convicted is a general law; a law which hears before it condemns; which proceeds upon inquiry and renders

judgment only after trial. Under this law the plaintiff in error was accorded the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, and to have compulsory process to compel the attendance of witnesses in his own behalf; to have a speedy public trial by an impartial jury of the county or district in which the offense is allged to have been committed, and the right of appeal in all cases.

All of the safeguards thrown about the selection and empaneling of a jury, are required to be observed by this law; and, in every respect, save only that the Constitution fixes the number of jurors at eight instead of twelve, does it conform to the requirements of the common law. Is the supreme law of a sovereign state void for this reason?

Adopting the language of Mr. Justice Matthews in Hurtado v. California, supra, with entire confidence we assert that the proceeding by which petitioner was tried and convicted in this case was a "legal proceeding enforced by public authority," and although not sanctioned by age, it was "newly devised in the discretion of the legislative power

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Respectfully submitted,

ALEXANDER C. BIS

Attorne

WILLIAM A. LEE,

Deputy Attorney General.

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THE statement of the case is in the opinion of the court.

Mr. J. W. N. Whitecotton for plaintiff in error.

Mr. Alexander C. Bishop for defendant in error. *Mr. William A. Lee* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in a state court of the State of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

In May, 1899, he applied to the Supreme Court of the State for a writ of *habeas corpus*, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful, because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under article 5 of the amendments to the Constitution of the United States, and also violated section 1 of article 14 of those amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under article 6, and also violated section 1 of article 14 of such amendments; (3) that a trial by such a jury and his subsequent imprisonment by reason of the verdict of that jury deprived him of his liberty without due process of law, in violation of section 1 of article 14, which provides that no State shall deprive any person of life, liberty or property, without due process of law.

The Supreme Court of the State, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the state prison, to undergo the remainder of his sentence, and he then sued out a writ of error and brought the case here.

The questions to be determined in this court are, (1) as to the validity, with reference to the Federal Constitution, of the proceeding against the plaintiff in error on an information instead of by an indictment by a grand jury; and (2) the validity of the trial of the plaintiff in error by a jury composed of eight instead of twelve jurors.

We think the various questions raised by the plaintiff in error have in substance, though not all in terms, been decided by this court in the cases to which attention will be called. The principles which have been announced in those cases clearly prove the validity of the clauses in the constitution of Utah which are herein attacked as in violation of the Constitution of the United States. It will, therefore, be necessary in this case to do but little else than call attention to the former decisions of this court, and thereby furnish a conclusive answer to the contentions of plaintiff in error.

The proceeding by information and also the trial by a jury, composed of eight jurors, were both provided for by the state constitution.

Section 13, article 1, of the constitution of Utah provides:

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it."

Section 10, article 1, of that constitution is as follows:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of infe-

rior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of *Hurtado* v. *California*, 110 U. S. 516. The case has since been frequently approved. *Hallinger* v. *Davis*, 146 U. S. 314, 322; *McNulty* v. *California*, 149 U. S. 645; *Hodgson* v. *Vermont*, 168 U. S. 262, 272; *Holden* v. *Hardy*, 169 U. S. 366, 384; *Brown* v. *New Jersey*, 175 U. S. 172, 176; *Bolln* v. *Nebraska*, 176 U. S. 83.

But the plaintiff in error contends that the *Hurtado case* did not decide the question whether the state law violated that clause in the Fourteenth Amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Although the opinion is mainly devoted to an inquiry whether the California law was a violation of the "due process clause" of the above-mentioned amendment, yet the matter in issue in the case was as to the validity of the state law, and the court held it valid. It was alleged by the counsel for the plaintiff in error, before the court which passed sentence, that the proceeding was in conflict with the Fifth and the Fourteenth Amendments, and those grounds were before this court. The Fifth Amendment was referred to in the opinion delivered in this court, and it was held not to have been violated by the state law, although that amendment provides for an indictment by a grand jury. This decision could not have been arrived at if a citizen of the United States were entitled, by virtue of that clause of the Fourteenth Amendment relating to the privileges and immunities of citizens of the United States, to claim in a state court that he could not be prosecuted for an infamous crime unless upon an indictment by a grand jury. In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the

Fifth Amendment. Yet this amendment was held in the *Hurtado case* not to apply to a prosecution for murder in a state court pursuant to a state law. The claim was made in the case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the States themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the Federal Government. By holding that the conviction upon an information was valid, the court necessarily held that an indictment was not necessary; that exemption from trial for an infamous crime, excepting under an indictment, was not one of those privileges or immunities of a citizen of the United States which a State was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case.

Under these circumstances it may not be improper to inquire as to the validity of a conviction in a state court, for an infamous crime, upon an information filed by the proper officer under the authority of the constitution and laws of the State wherein the crime was committed and the conviction took place; confining the inquiry to the question of the effect of the provision in the Fourteenth Amendment prohibiting the States from making or enforcing any law which abridges the privileges or immunities of citizens of the United States. To the other objection, that a conviction upon an information deprives a person of his liberty without due process of law, the *Hurtado case* is, as we have said, a complete and conclusive answer.

The inquiry may be pursued in connection with that in regard to the validity of the provision in the state constitution for a trial before a jury to be composed of but eight jurors in criminal cases which are not capital. One of the objections to this provision is that its enforcement has abridged the privileges and immunities of the plaintiff in error as a citizen of the United States; the other objection being that a

conviction thus obtained has resulted in depriving the plaintiff in error of his liberty without due process of law. Postponing an inquiry in regard to this last objection until we have examined the other, we proceed to inquire what are the privileges and immunities of a citizen of the United States which no State can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors?

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343, 349. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held. *American Publishing Company* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707.

It would seem to be quite plain that the provision in the Utah constitution for a jury of eight jurors in all state criminal trials, for other than capital offences, violates the Sixth Amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the States. In order to limit the powers which it was feared might be claimed or exercised by the Federal Government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several States by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the General Government, and were not intended to and did not have any effect upon the powers of the respective States. This has

been many times decided. The cases herewith cited are to that effect, and they cite many others which decide the same matter. *Spies* v. *Illinois*, 123 U. S. 131, 166; *Holden* v. *Hardy*, 169 U. S. 366, 382; *Brown* v. *New Jersey*, 175 U. S. 172, 174.

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and, therefore, the States cannot provide for any procedure in state courts which could not be followed in a Federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the *Spies case*, 123 U. S. 131, 151; but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the *Slaughter-house cases*, 16 Wall. 36, the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular State, was treated by Mr. Justice Miller in delivering the opinion of the court. He stated that the argument in favor of the plaintiffs, claiming that the ordinance of the city of New Orleans was invalid, rested wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the Fourteenth Amendment are the same as to citizens of the United States and citizens of the several States. This he showed to be not well founded; that there was a citizenship of the United States and a citizenship of the States, which were distinct from each other, depending upon different characteristics and circumstances in the individual; that it was only privileges and immunities of the citizen of the United States that were placed by the amendment under the protection of the Federal Constitution, and that the privileges and immunities of a citizen of a State, whatever they might be, were not

MAXWELL *v.* DOW.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 884. Argued December 4, 1899. — Decided February 26, 1900.

The decision in *Hurtado* v. *California*, 110 U. S. 516, that the words "due process of law" in the Fourteenth Amendment to the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, has been often affirmed, and is now reaffirmed and applied to this case.

The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government.

The trial of a person accused as a criminal by a jury of only eight persons instead of twelve, and his subsequent imprisonment after conviction do not abridge his privileges and immunities under the Constitution as a citizen of the United States and do not deprive him of his liberty without due process of law.

Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are proper to be determined by the citizens of each State for themselves, and do not come within the Fourteenth Amendment to the Constitution so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure, and to have the same kind of trial, and the equal protection of the laws is secured to them.

intended to have any additional protection by the paragraph in question, but they must rest for their security and protection where they have heretofore rested.

He then proceeded to inquire as to the meaning of the words "privileges and immunities" as used in the amendment, and said that the first occurrence of the phrase in our constitutional history is found to be in the fourth article of the old confederation, in which it was declared "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." A provision corresponding to this, he found in the Constitution of the United States in section 2 of the fourth article, wherein it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." What those privileges were is not defined in the Constitution, but the justice said there could be but little question that the purpose of both those provisions was the same, and that the privileges and immunities intended were the same in each. He then referred to the case of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania, in 1823, 4 Washington C. C. 371, where the question of the meaning of this clause in the Constitution was raised. Answering the question, what were the privileges and immunities of citizens of the several States, Mr. Justice Washington said in that case:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign

What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; . . . The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Having shown that prior to the Fourteenth Amendment the legislation under review would have been regarded as relating to the privileges or immunities of citizens of the State, with which the United States had no concern, Justice Miller continued:

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any

of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress in the exercise of power heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these Governments to the people; the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

If the rights granted by the Louisiana legislature did not infringe upon the privileges or immunities of citizens of the United States, the question arose as to what such privileges were, and in enumerating some of them, without assuming to state them all, it was said that a citizen of the United States, as such, had the right to come to the seat of government to assert claims or transact business, to seek the protection of the government or to share its offices; he had the right of free access to its seaports, its various offices throughout the country, and to the courts of justice in the several States; to de-

mand the care and protection of the General Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government; the right, with others, to peaceably assemble and petition for a redress of grievances; the right to the writ of *habeas corpus*, and to use the navigable waters of the United States, however they may penetrate the territory of the several States; also all rights secured to our citizens by treaties with foreign nations; the right to become citizens of any State in the Union by a *bona fide* residence therein, with the same rights as other citizens of that State; and the rights secured to him by the Thirteenth and Fifteenth amendments to the Constitution. A right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the State and not covered by the amendment.

Other objections to the judgment were fully examined, and the result was reached that the legislation of the State of Louisiana complained of violated no provision of the Constitution of the United States.

We have made this extended reference to the case because of its great importance, the thoroughness of the treatment of the subject, and the great ability displayed by the author of the opinion. Although his suggestion that only discrimination by a State against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws, has not been affirmed by the later cases, yet it was but the expression of his belief as to what would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of that portion of the Fourteenth Amendment of which it treats.

The definition of the words "privileges and immunities," as given by Mr. Justice Washington, was adopted in substance in *Paul* v. *Virginia*, 8 Wall. 168, 180, and in *Ward* v. *Maryland*, 12 Wall. 418, 430. These rights, it is said in the *Slaughter-house cases*, have always been held to be the class of

rights which the State Governments were created to establish and secure.

In the same volume as the *Slaughter-house cases* is that of *Bradwell* v. *The State*, 16 Wall. 130, where it is held that the right to practice law in the courts of a State is not a privilege or immunity of a citizen of the United States, within the meaning of the Fourteenth Amendment. And in *Minor* v. *Happersett*, 21 Wall. 162, it was held that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and although a woman was in one sense a citizen of the United States, yet she did not obtain the right of suffrage by the adoption of that amendment. The right to vote is a most important one in our form of government, yet it is not given by the amendment.

In speaking of the meaning of the phrase "privileges and immunities of citizens of the several States," under section second, article fourth, of the Constitution, it was said by the present Chief Justice, in *Cole* v. *Cunningham*, 133 U. S. 107, that the intention was "to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

And in *Blake* v. *McClung*, 172 U. S. 239, 248, various cases are cited regarding the meaning of the words "privileges and immunities," under the fourth article of the Constitution, in not one of which is there any mention made of the right claimed in this case, as one of the privileges or immunities of citizens in the several States.

These cases show the meaning which the courts have attached to the expression, as used in the fourth article of the Constitution, and the argument is not labored which gives the same meaning to it when used in the Fourteenth Amendment.

That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to every

one, white or black, that comes within its provisions. But, as said in the *Slaughter-house cases*, the protection of the citizen in his rights as a citizen of the State still remains with the State. This principle is again announced in the decision in *United States* v. *Cruikshank*, 92 U. S. 542, wherein it is said that sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States. But if all these rights are included in the phrase "privileges and immunities" of citizens of the United States, which the States by reason of the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the State in regard to them has been entirely destroyed, and the *Slaughter-house cases*, and *United States* v. *Cruikshank* are all wrong, and should be overruled.

It was said in *Minor* v. *Happersett*, *supra*, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in *In re Kemmler*, 136 U. S. 436, 448, it was stated by the present Chief Justice that —

"The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the National government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542; *Slaughter-house cases*, 16 Wall. 36."

In Cooley's Constitutional Limitations, (4th ed. p. 497, marginal page 397,) the author says:

"Although the precise meaning of 'privileges and immunities' is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same State are not subject to."

There is no intimation here that among the privileges or immunities of a citizen of the United States are the right of trial by jury in a state court for a state offence and the right to be exempt from any trial for an infamous crime, unless upon presentment by a grand jury. And yet if these were such privileges and immunities, they would be among the first that would occur to any one when enumerating or defining them. Nor would these rights come under the description given by the Chief Justice in the *Kemmler case*, *supra*. Such privileges or immunities do not arise out of the nature or essential character of the National Government.

In *Walker* v. *Sauvinet*, 92 U. S. 90, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. The action was tried without a jury by virtue of an act of the legislature of the State of Louisiana. The plaintiff in error objected to such a trial, alleging that he had a constitutional right to a trial by jury, and that the statute was void to the extent that it deprived him of that right. The objection was overruled. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"By article 7 of the amendments it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards* v. *Elliott*, 21 Wall.

532, 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land — that is to say, with the Constitution and laws of the United States made in pursuance thereof — or with any treaty made under the authority of the United States."

This case shows that the Fourteenth Amendment in forbidding a State to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the Federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to

certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen.

So it was held in the oyster planting case, *McCready* v. *Virginia*, 94 U. S. 391, that the right which the people of that State acquired to appropriate its tide waters and the beds therein for taking and cultivating fish, was but a regulation of the use, by the people, of their common property, and the right thus acquired did not come from their citizenship alone, but from their citizenship and property combined. It was, therefore, a property right and not a mere privilege or immunity of citizenship, and, for that reason, the citizen of one State was not invested by the Constitution of the United States with any interest in the common property of the citizens of another State.

This was a decision under another section of the Constitution (section second of article fourth) from the one under discussion, and it gives to the citizens of each State all privileges and immunities of citizens of the several States, but it is cited for the purpose of showing that where the privilege or immunity does not rest alone upon citizenship, a citizen of another State does not participate therein.

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgment of the privileges or immunities of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where every one has the same as against the Federal Government, whether citizen or not.

The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities. The *Sauvinet case* is an authority in favor of the contention that the amendment

does not preclude the States by their constitutions and laws from altering the rule as to indictment by a grand jury, or as to the number of jurors necessary to compose a petit jury in a criminal case not capital.

The same reasoning is applicable to the case of *Kennard* v. *Louisiana*, 92 U. S. 480, although that case was decided with special reference to the "due process of law" clause.

In *Kemmler's case*, 136 U. S. 436, it was stated that it was not contended and could not be that the Eighth Amendment to the Federal Constitution was intended to apply to the States. This was said long after the adoption of the Fourteenth Amendment, and also subsequent to the making of the claim that by its adoption the limitations of the preceding amendments had been altered and enlarged so as in effect to make them applicable to proceedings in the state courts.

In *Presser* v. *Illinois*, 116 U. S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the National Government, and not of the States. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.

In *O'Neil* v. *Vermont*, 144 U. S. 323, 332, it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the States.

In *Thorington* v. *Montgomery*, 147 U. S. 490, it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of Federal power, and has no application to the States.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the

powers of the Federal Government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them.

It has been held that the last clause of the Seventh Amendment, which provides that no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law, is not confined to trials by jury in Federal courts, but applies equally to a cause tried before a jury in a state court and brought thence before a Federal court. *The Justices* v. *Murray*, 9 Wall. 274; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226; *Capital Traction Company* v. *Hof*, 174 U. S. 1. But these decisions only carry out the idea that the amendment is a restraint upon Federal power, and not upon the power of the State, inasmuch as they declare that the clause restricts the right of the Federal courts to reëxamine the facts found by a jury in a state court, as well as in a Federal one.

In *Missouri* v. *Lewis*, 101 U. S. 22, it was held that the clause of the Fourteenth Amendment, which prohibits a State from denying to any person the equal protection of the laws, did not thereby prohibit the State from prescribing the jurisdiction of its several courts either as to their territorial limits or the subject-matter, or amount or finality of their respective judgments or decrees; that a State might establish one system of law in one portion of its territory and another system in another, provided it did not encroach upon the proper jurisdiction of the United States, nor abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws in the same district, nor deprive him of his rights without due process of law. In the course of the opinion, which was delivered by Mr. Justice Bradley, he said:

"We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for

all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its

discretion, provide for these various exigencies. If a Mexican State should be acquired by treaty and added to an adjoining State or part of a State in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard for the welfare of all classes within the particular territory or jurisdiction."

Although this case was principally discussed under that clause of the Fourteenth Amendment which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws, yet the application of the amendment with regard to the privileges or immunities of citizens of the United States was also referred to, and if it had been supposed that it secured to a citizen of the United States, when proceeded against under state authority, all the privileges and immunities set forth in the first eight amendments to the Federal Constitution, Mr. Justice Bradley could not, in the course of his opinion in the case, have said that a trial by jury might exist as a right in one State and not exist in another. Trial by jury would in such case have been protected under the Fourteenth Amendment, because it was granted to all persons by article six in all criminal prosecutions in the Federal courts, and by article seven in civil actions at common law, where the value in controversy should exceed twenty dollars. On the contrary, it was stated that great diversity in these respects might exist in two States separated only by an imaginary line, on one side of which there might be a right of trial by jury, and on the other side no such right. Each State, it was said, prescribes its own modes of judicial procedure. The decision of this case was by a unanimous court, and the remarks of the justice are wholly irreconcilable with the existence of a right of trial by jury in a state court which was guaranteed and protected by the Fourteenth Amendment, notwithstanding the

denial of such right by and under the constitution and laws of the State.

The principle to be deduced from these various cases is that the rights claimed by the plaintiff in error rest with the state governments, and are not protected by the particular clause of the amendment under discussion. What protection may be afforded the individual against state legislation or the procedure in state courts or tribunals under other clauses of the amendment, we do not now inquire, as what has been heretofore said is restricted to the particular clause of that amendment which is now spoken of, the privileges or immunities of citizens of the United States.

Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, wherein he stated that among the privileges and immunities which the committee having the amendment in charge sought to protect against invasion or abridgment by the States, were included those set forth in the first eight amendments to the Constitution, and counsel has argued that this court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important

as explanatory of the grounds upon which the members voted in adopting it. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318; *Dunlap* v. *United States*, 173 U. S. 65, 75.

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.

For the reasons stated, we come to the conclusion that the clause under consideration does not affect the validity of the Utah constitution and legislation.

The remaining question is, whether in denying the right of an individual, in all criminal cases not capital, to have a jury composed of twelve jurors, the State deprives him of life, liberty or property, without due process of law.

This question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado case*, *supra*. The distinct question was there presented whether it was due process of law to prosecute a person charged with murder by an information under the state constitution and law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a petit jury of the number fixed by the common law. If the State have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of rea-

soning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado case* was decided are to be found gathered in *Hodgson* v. *Vermont*, 168 U. S. 262; *Holden* v. *Hardy*, 169 U. S. 366, 384; *Brown* v. *New Jersey*, 175 U. S. 172; *Bolln* v. *Nebraska*, 176 U. S. 83.

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado case* is a trial by jury mentioned as a necessary part of such process.

In *In re Converse*, 137 U. S. 624, it was stated that the Fourteenth Amendment was not designed to interfere with the power of a State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a State in administering process provided by the law of the State.

In *Caldwell* v. *Texas*, 137 U. S. 692, it was held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

In *Leeper* v. *Texas*, 139 U. S. 462, 467, it was said "that by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or class of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Hurtado* v. *California*, 110 U. S. 516, 535, and cases cited." See also for statement

as to due process of law the cases of *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701, 707.

The clause has been held to extend to a proceeding conducted to judgment in a state court under a valid statute of the State, if such judgment resulted in the taking of private property for public use, without compensation made or secured to the owner, under the conditions mentioned in the cases herewith cited. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226; *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557.

It has also been held not to impair the police power of a State. *Barbier* v. *Connolly*, 113 U. S. 27.

It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462. It is emphatically the case of the people by their organic law, providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. Under this construction of the

amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown* v. *New Jersey*, 175 U. S. 172, the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

Judged by the various cases in this court we think there is no error in this record, and the judgment of the Supreme Court of Utah must, therefore, be

Affirmed.

Mr. Justice Harlan, dissenting.

Under an information filed against him in one of the courts of the State of Utah, Maxwell, the plaintiff in error, a citizen of the United States, was convicted of the crime of robbery, and having been tried by a jury consisting of eight persons was found guilty and sentenced to confinement in the penitentiary for the term of eighteen years.

He insists that his imprisonment is in violation of the Constitution of the United States in that he was proceeded against by information — not by indictment or presentment of a grand

jury — and was tried for an infamous crime by a jury composed of less than twelve persons.

By its opinion and judgment just rendered this court holds that neither the prosecution by information nor the trial by eight jurors was in violation of the Constitution of the United States.

Upon the first point I do not care to say anything. For, in *Hurtado* v. *California*, 110 U. S. 516, this court held that a state enactment authorizing the prosecution by information for the crime of murder in the first degree — the penalty for such crime being death — was not in violation of the Constitution of the United States. The principles there announced have been reaffirmed in later cases. In the *Hurtado case* I dissented from the opinion and judgment of the court and stated fully the reasons why, in my judgment, no civil tribunal or court, Federal or state, could legally try a citizen of the United States for an infamous crime otherwise than on the indictment or presentment of a grand jury. I adhere to the views then expressed, but further discussion of the question decided seems unnecessary.

The remaining question in the present case is whether the trial of the accused by eight jurors is forbidden by the Constitution of the United States.

The Fourteenth Amendment, after declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," nor "shall any State deprive any person of life, liberty or property without due process of law."

What are the privileges and immunities of "citizens of the United States"? Without attempting to enumerate them, it ought to be deemed safe to say that such privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair.

When the Constitution was adopted by the Convention of

1787 and placed before the people for their acceptance or rejection, many wise statesmen whose patriotism no one then questioned or now questions earnestly objected to its acceptance upon the ground that it did not contain a Bill of Rights guarding the fundamental guarantees of life, liberty and property against the unwarranted exercise of power by the National Government. But the friends of the Constitution, believing that the failure to accept it would destroy all hope for permanent union among the people of the original States, and following the advice of Washington who was the leader of the constitutional forces, met this objection by showing that when the Constitution had been accepted by the requisite number of States and thereby become the supreme law of the land, such amendments could be adopted as would relieve the apprehensions of those who deemed it necessary, by express provisions, to guard against the infringement by the agencies of the General Government of any of the essential rights of American freemen. This view prevailed, and the implied pledge thus given was carried out by the first Congress, which promptly adopted and submitted to the people of the several States the first ten amendments. These amendments have ever since been regarded as the National Bill of Rights.

Let us look at some of those amendments. It is declared by the First, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances;" by the Third, "no soldier shall in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law;" by the Fourth, "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;" by the Fifth, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation;" by the Sixth, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence;" and by the Eighth, "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It seems to me that the privileges and immunities enumerated in these amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to themselves and their posterity, the political community known as the People of the United States ordained and established the Constitution of the United States; and every member of that political community was a citizen of the United States. It was that community that adopted, in the mode prescribed by the Constitution, the first ten amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified — the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty — could never be impaired or destroyed by the National Government.

Now, the original Constitution declared that "the trial of all crimes, except in cases of impeachment, shall be by jury." This was supplemented by the Sixth Amendment, declaring that in all criminal prosecutions the accused should enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime was committed. And

we have held that the jury here referred to was a common law jury consisting of neither more or less than twelve persons, whose unanimous verdict was necessary to acquit or convict the accused; that a jury of less number was not admissible in any criminal trial in the District of Columbia or in a Territory of the United States, or in any prosecution of a criminal character in a court of the United States or in any court organized under the authority of the United States. *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343. We have often adjudged that the declaration in Magna Charta that the King would not pass upon any freeman, nor condemn him, "but by the lawful judgment of his peers," referred to a jury of twelve persons.

It is not difficult to understand why the fathers intrenched the right of trial by jury in the supreme law of the land. They regarded the recognition and exercise of that right as vital to the protection of liberty against arbitrary power. Mr. Hallam in his Constitutional History of England, after observing that liberty had been the slow fruit of ages, said that as early as the reign of Henry VII one of the essential checks upon royal power was that "the fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made." And it is an interesting fact that the first ordinance adopted by the Plymouth Colony in 1623 was one declaring among other things that "all criminal facts" should be tried "by the verdict of twelve honest men to be impanneled by authority, in form of a jurye upon their oaths." The value of that institution was recognized by the patriotic men of the Revolutionary period when in the Declaration of Independence they complained that the King of Great Britain had deprived the people of the Colonies in many cases of the benefits of trial by jury. Referring to the provisions of the Federal Constitution relating to the personal security of citizens of the United States, Kent says they "must be regarded as fundamental in every State, for the colonies were parties to the national declaration of rights in 1774, in which the trial by

jury, and the other rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright." Upon this general subject Mr. Justice Story in his Commentaries on the Constitution has said: "It was under the consciousness of the full possession of the rights, liberties and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them. And for the most part they thus succeeded in obtaining a real and effective Magna Charta of their liberties. The trial by jury in all cases, civil and criminal, was as firmly and universally established in the colonies as in the mother country." 1 Story's Const. § 165. Again, the same eminent jurist says: "It seems hardly necessary in this place to expatiate upon the antiquity or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta, in which it is declared, *nullus homo capiatur, nec imprisonetur, aut exuletur, aut aliquo modo destruatur, &c.; nisi per legale judicium parium suorum, vel per legem terræ;* no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, etc., but by the judgment of his peers, or by the law of the land. The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the State. When our more immediate ancestors removed to America, they brought this privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms. The great object of a trial by jury

in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former." 2 Story's Const. § 1779. Blackstone has said: "A celebrated French writer, who concludes that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury." 2 Bl. Com. 379. In a recent American work on trial by jury the author well says: "The English colonists settled here with a deep-rooted regard for this right. It had been, no doubt, to them in the mother country a valuable protection. They brought it with them and established it as one of their dearest privileges, and in every enumeration of their rights and immunities it takes a conspicuous place." Again, the same author: "Ever since Magna Charta, the right to a trial by jury has been esteemed a peculiarly dear and inestimable privilege by the English race; and whether in a strictly historical view the right was defined or secured by that instrument or not, it was nevertheless invariably appealed to and implicitly relied on as unalterably and inviolably securing the right among other valuable privileges guaranteed therein. During long centuries, when popular rights were overborne by prerogative or despotism, those who claimed and were denied the right to such a trial, founded their demand on the guarantee of the Great Charter, and solemnly protested against its violation when the privilege was denied them; and whenever an invasion or violation of individual rights was threatened, the security afforded by this guarantee was relied on as an effectual safeguard either to repel the attack or nullify its effect." Proffat on Jury Trials, §§ 81, 82. And this court has declared that "the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons* v. *Bedford*, 3 Pet. 433, 446.

Notwithstanding this history of the incorporation into the

Constitution of the United States of the provision relating to trial by jury, it is now adjudged that immunity from trial for crime except by a jury of twelve jurors is not an immunity belonging to citizens of the United States within the meaning of the Fourteenth Amendment.

It does not solve the question before us to say that the first ten amendments had reference only to the powers of the National Government and not to the powers of the States. For if prior to the adoption of the Fourteenth Amendment it was one of the privileges or immunities of citizens of the United States that they should not be tried for crime in any court organized or existing under National authority except by a jury composed of twelve persons, how can it be that a citizen of the United States may be now tried in a state court for crime, particularly for an infamous crime, by eight jurors, when that amendment expressly declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"? It does not meet the case to say that a trial by eight jurors is as much a trial by jury as if there were twelve jurors; for if a citizen charged with crime can be subjected to trial by a less number of jurors than that prescribed by the Constitution, the number may be reduced to three. Indeed, under the interpretation now given to the amendment, it will, I think, be impossible to escape the conclusion that a State may abolish trial by jury altogether in a criminal case, however grave the offence charged, and authorize the trial of a case of felony before a single judge. I cannot assent to this interpretation, because it is opposed to the plain words of the Constitution, and defeats the manifest object of the Fourteenth Amendment.

I am of opinion that under the original Constitution and the Sixth Amendment, it is one of the privileges and immunities of citizens of the United States that when charged with crime they shall be tried only by a jury composed of twelve persons; consequently, a state statute authorizing the trial by a jury of eight persons of a citizen of the United States, charged with crime, is void under the Fourteenth Amendment declaring that no State shall make or enforce any law that

"shall abridge the privileges or immunities of citizens of the United States."

I am also of opinion that the trial of the accused for the crime charged against him by a jury of eight persons was not consistent with the "due process of law" prescribed by the Fourteenth Amendment. Referring to the words in the Fifth Amendment, that "no person shall be deprived of life, liberty or property without due process of law," this court said in *Murray's Lessee* v. *Hoboken*, 18 How. 272, 276–7: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It was manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors*, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

No one, I think, can produce any authority to show that according to the "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors," the trial of one accused of felony otherwise than by a jury of twelve, or wholly without a jury, was consistent with "due process of law." If the original Constitution had not contained a specific prohibition of trials for crime otherwise than by a jury, the requirement of due process of law in the Fifth Amendment would have stood in the way of any act of Congress authorizing criminal trials in the

Federal courts in any mode except by a common law jury. When therefore the Fourteenth Amendment forbade the deprivation by any State of life, liberty or property without due process of law, the intention was to prevent any State from infringing the guarantees for the protection of life and liberty that had already been guarded against infringement by the National Government.

This interpretation of the Fourteenth Amendment finds support in some of the decisions of this court. In addition to the clause forbidding the deprivation of property "without due process of law," there is in the Fifth Amendment a clause specifically declaring "nor shall private property be taken for public use without just compensation." The Fourteenth Amendment does not in terms refer to the taking of private property for public use, yet we have held that the requirement of "due process of law" *in that amendment* forbids the taking of private property for public use without making or securing just compensation. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 233, 241; *Norwood* v. *Baker*, 172 U. S. 269, 277.

If then the "due process of law" required by the Fourteenth Amendment does not allow a State to take private property without just compensation, but does allow the life or liberty of the citizen to be taken in a mode that is repugnant to the settled usages and the modes of proceeding authorized at the time the Constitution was adopted and which was expressly forbidden in the National Bill of Rights, it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.

If the court had not ruled otherwise, I should have thought it indisputable that when by the Fourteenth Amendment it was declared that no State should make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, the people of the United States put upon the States the same restrictions that had been imposed upon the National Government in respect as well of the privileges and immunities of citizens of the United States as of

the protection of the fundamental rights of life, liberty and property.

The decision to-day rendered is very far reaching in its consequences. I take it no one doubts that the great men who laid the foundations of our Government regarded the preservation of the privileges and immunities specified in the first ten amendments as vital to the personal security of American citizens. To say of any people that they do not enjoy those privileges and immunities is to say that they do not enjoy real freedom. But suppose a State should prohibit the free exercise of religion; or abridge the freedom of speech or of the press; or forbid its people from peaceably assembling to petition the government for a redress of grievances; or authorize soldiers in time of peace to be quartered in any house without the consent of the owner; or permit the persons, houses, papers and effects of the citizen to be subjected to unreasonable searches and seizures under warrants not issued upon probable cause nor supported by oath or affirmation, nor describing the place to be searched and the persons or things to be seized; or allow a person to be twice put in jeopardy of life or limb; or compel the accused to be a witness against himself; or deny to the accused the right to be informed of the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, or to have the assistance of counsel; or require excessive bail; or inflict cruel and unusual punishment. These or any of these things being done by a State, this court, according to the reasoning and legal effect of the opinion just delivered, would be bound to say that the privileges and immunities specified were not privileges and immunities of citizens of the United States within the meaning of the Fourteenth Amendment, and that citizens of the United States affected by the action of the State could not invoke the protection of that amendment or of any other provision of the National Constitution. Suppose the State of Utah should amend its constitution and make the Mormon religion the established religion of the State, to be supported by taxation on all the people of Utah. Could its right to do

so, as far as the Constitution of the United States is concerned, be gainsayed under the principles of the opinion just delivered? If such an amendment were alleged to be invalid under the National Constitution, could not the opinion herein be cited as showing that the right to the free exercise of religion was not a privilege of a "citizen of the United States" within the meaning of the Fourteenth Amendment? Suppose, again, a State should prescribe as a punishment for crime burning at the stake or putting out the eyes of the accused. Would this court have any alternative under the decision just rendered but to say that the immunity from cruel and unusual punishments recognized in the Eighth Amendment as belonging to every citizen of the United States was not an immunity of a citizen within the meaning of the Fourteenth Amendment and was not protected by that amendment against impairment by the State? The privileges and immunities specified in the first ten amendments as belonging to the people of the United States are equally protected by the Constitution. No judicial tribunal has authority to say that some of them may be abridged by the States while others may not be abridged. If a State can take from the citizen charged with crime the right to be tried by a jury of twelve persons, it can, so far as the Constitution of the United States is concerned, take away the remaining privileges and immunities specified in the National Bill of Rights. There is no middle position, unless it be assumed to be one of the functions of the judiciary by an interpretation of the Constitution to mitigate or defeat what its members may deem the erroneous or unwise action of the people in adopting the Fourteenth Amendment. The court cannot properly say that the Constitution of the United States does not protect the citizen when charged with crime in a state court against trial otherwise than by a jury of twelve persons, but does protect him against cruel and unusual punishment, or against being put twice in jeopardy of life or limb for the same offence, or against being compelled to testify against himself in a criminal prosecution, or in freedom of speech or in the free exercise of religion. The right to be tried when charged with crime by a jury of twelve persons

is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments originally limited only the powers of the National Government in respect of the privileges and immunities specified therein, since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also guarded against infringement by the States.

If it be said that there need be no apprehension that any State will strike down the guarantees of life and liberty which are found in the National Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as the result of a mode of trial that would not have been tolerated in England at the time American independence was achieved, nor even now, and would have caused the rejection of the Constitution by every one of the original States if it had been sanctioned by any provision in that instrument when it was laid before the people for acceptance or rejection. Liberty, it has been well said, depends not so much upon the absence of actual oppression as on the existence of constitutional checks upon the power to oppress. These checks should not be destroyed or impaired by judicial decisions. On the contrary, speaking by Mr. Justice Bradley, we have declared in *Boyd* v. *United States*, 116 U. S. 616, 636, that "it is the duty of the courts to be watchful for the constitutional rights of the citizen." If some of the guarantees of life, liberty and property which at the time of the adoption of the National Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any State striking down guarantees of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of freemen.

I dissent from the opinion and judgment of the court.